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# A TREATISE

ON

# MILITARY LAW

AND THE

# PRACTICE OF COURTS-MARTIAL.

BY

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# PREFACE.

WITHIN the past few years, more has been done to fix disputed and doubtful points in the practice of our military tribunals, than during any former period in our military history. For this progressive movement, we are mainly indebted to the able decisions, while reviewing the proceedings of courts-martial, that have issued from the War Department since the establishment of the office of Judge Advocate of the Army; and to the many elaborate opinions by the Attorneys General, on points of law requiring legal interpretation. These decisions and opinions, presenting, as they do, authoritative information of unusual interest to the army at large and not generally accessible, first suggested the preparation of a work in which they might be embodied. The suggestion lost none of its force, in view of the fact, that for the instruction of the Cadets of the Military Academy in the practice of courts-martial, this most essential information was not to be found in their text-book.

This volume has been the result of much careful investigation, and the hope is entertained that it may contribute a useful link in the chain of our military jurisprudence. To the Judge Advocate of the Army, I am indebted, for furnishing me the information I had occasion to seek in the records of the War Department.

UNITED STATES MILITARY ACADEMY,
WEST POINT, N. Y., *March 25th*, 1862.

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# MILITARY LAW AND COURTS-MARTIAL.

## CHAPTER I.

## MILITARY LAW.

**Military Law** is that portion of the law of the land, designed for the government of a particular class of persons, and administered by special tribunals. It is superinduced to the ordinary law for the purpose of regulating the citizen in his character of soldier; and although military offences are not cognizable under the common law jurisdiction of the United States, yet the articles of war clearly recognize the superiority of the civil over the military authority.

The constitution of the United States empowers Congress "to raise and support armies; to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces."* As an essential part of these powers, it belongs exclusively to Congress to ordain or provide for courts-martial and define their jurisdiction; to make their sentences final and conclusive, or subject to reviewing authority; to designate by whom they shall be convened, and then confirmed

* Art. 1, section 8.

or disapproved; and generally, to make such statutory provision concerning them, as in their wisdom may be deemed proper and necessary.

**Rules and Articles of War.** The Congress has exercised that power in the enactment of the law of April 10th, 1806—all previous rules and regulations being declared "void and of no effect." This act, with some slight legislative modifications, constitutes the entire code of laws now in force for the government of the armies of the United States; and by its provisions alone, are courts-martial made the proper and sole tribunals for the trial of military offences.

A court-martial is a lawful tribunal, existing by the same authority that any other court exists by, and the law military is a branch of law as valid as any other, and it differs from the general law of the land in authority only in this, that it applies to officers and soldiers of the army, but not to other members of the body politic, and that it is limited to breaches of military duty.*

Courts-martial are regulated by the *articles of war*, the *general regulations* of the army, and by the orders of the President relating thereto, and extant at the time; their practice is moreover regulated, in points where the written law is silent, by the *custom of war*, by which expression, as here applied, must be understood the customs and usages of the United States army.

**General Regulations.** The act of Congress of March 3d, 1813, enacts, "that it shall be the duty of the secretary of the war department, and he is hereby authorized to prepare general regulations, &c., &c., which, when approved by the President of the United States,

* Grant *vs.* Gould, ii. H. Blacks, 69, 98, 100.

shall be respected and obeyed, until altered or revoked by the same authority." The act of April 24th, 1816, enacts, "that the regulations in force before the reduction of the army,* be recognized, as far as the same shall be found applicable to the service; subject, however, to such alterations as the secretary of war may adopt with the approbation of the President." Under this authority the "general regulations of the army" now in force have legal effect, and so far as concerns the regulating of that body, for whose guidance they were framed, have all the binding force of military law; provided of course, that they be consistent with the constitution and the laws of the United States.

The cadets of the United States Military Academy are also subject to these general regulations, in whatever is applicable to them. In addition to this, they are subject to special regulations, not only because the secretary of war, under his general power to adopt regulations, may make special regulations for any branch of the service, but also because the act of April 29th, 1812, contemplates the establishment of specific regulations for the Military Academy. Under this double authority it is that the revised regulations issued by the department on the 14th March, 1853, now constitute the governing code of the academy.†

**Custom of War.** The custom of war is the *lex non scripta*, or common law of the army, and by the 69th article of war is recognized as a guide in administering military justice. It can be considered as authority only so far as to aid in removing any doubt that "should arise not explained by said articles," and must be an

* Approved March 3d, 1815. † Attorney-general's opinions, July 11th, 1855.

established custom, the growth of the service in which it is applied.

**Martial Law.** Martial law has been often confounded with military law, and it is difficult to give, in precise terms, its exact definition and import.

In *continental Europe*, as in France, we find the *state of siege*. This may have a lawful origin, either in an act of the political sovereignty, or in the necessity of circumstances. When it exists, the civil law is suspended for the time being, or at least made subordinate, and its place is taken by martial law, under the supreme, if not the direct, administration of the military power. The state of siege may exist, in a city or in a district of country, either by reason of the same being actually besieged or invested by a hostile force, or by reason of domestic insurrection. In either case it is the precise fact we are now considering. The state of siege of the continental jurists, is the proclamation of martial law of England and the United States—only we are without law on the subject, while in other countries it is regulated by known limitations.*

In a debate in Parliament, the Duke of Wellington contended that martial law was neither more nor less than *the will of the general* who commands the army. In fact, martial law was no law at all. Therefore, the general who declared martial law and commanded that it should be carried into effect, was bound to lay down distinctly the rules, and regulations, and limits, according to which his will was to be carried out. Now, he had in another country, carried on martial law; that was to say, he had governed a large part of the popu-

*Opinions, February 3d, 1857.

lation of a country by his own will. He declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country strictly by the laws of the country, and he governed it with such moderation, that political servants and judges, who had at first fled or had been expelled, afterward consented to act under his direction. The judges sat in the courts of law, conducting their judicial business, and administering the law by his authority.*

Martial law, as exercised in any country by the commander of a foreign army, is an element of the *jus belli*. It is incidental to the state of solemn war, and appertains to the law of nations. The commander of the invading, occupying, or conquering army, rules the invaded, occupied, or conquered foreign country, with supreme power, limited only by international law, and the orders of the sovereign or government he serves or represents. Such occupation by right of war, so long as it is military only, that is, *flagrante bello*, will be the case put by the Duke of Wellington, of all the powers of the government resumed in the hands of the commander-in-chief. If any local authority continue to subsist, it will be with his permission only, and with power to do nothing except what he, in his plenary discretion, or his own sovereign through him, shall see fit to authorize.†

During the *occupation of Mexico* by the United States army, the general-in-chief declared martial law. After stating in his "general order" that the written code commonly called the rules and articles of war, does not

* Hansard, 3d series. † Cushing. Opinions, vol. VIII., 365.

provide for the punishment of certain crimes, such as assassination, murder, poisoning, rape, &c., and is absolutely silent as to all injuries which may be inflicted upon individuals of the army, or their property, against the laws of war, by individuals of a hostile country, General Scott remarks, that "a supplemental code is absolutely needed. That *unwritten* code is martial law, as an addition to the *written* military code, prescribed by Congress in the rules and articles of war, and which unwritten code all armies in hostile countries are forced to adopt, not only for their own safety, but for the protection of the unoffending inhabitants and their property, about the theatres of military operations, against injuries on the part of the army, contrary to the laws of war. * * * For this purpose, it is ordered, that all offenders in the matters aforesaid, shall be promptly seized, confined, and reported for trial before *military commissions*, to be duly appointed, &c."

These *commissions* were appointed, governed and limited as nearly as practicable, as prescribed for courts-martial; their proceedings to be recorded, reviewed, revised, disapproved or confirmed, and their sentences executed, all as near as may be, as in the cases of the proceedings and sentences of courts-martial; "provided that no military commission shall try any case, clearly cognizable, by any court-martial, and provided also that no sentence of a military commission shall be put in execution against any individual belonging to this army, which may not be, according to the nature and degree of the offence, as established by evidence, in conformity with known punishments, in like cases, in some one of the states of the United States of America.

"The administration of justice, both in civil and criminal matters, through the ordinary courts of the country, shall nowhere and in no degree be interrupted by any officer or soldier, except" in certain specified cases.*

The above was the form of martial law as declared in the enemy's country, and to cease of course when hostilities should cease. We must, however, clearly distinguish between martial law, as a foreign or international fact, and the same thing as a *domestic or municipal fact.*

In *Great Britain*, though the preamble of the mutiny act specifically declares the illegality of martial law in time of peace, it evidently recognizes the legality of resorting to that expedient in time of war and intestine commotion. The power of the sovereign, or the representative of majesty, to proclaim martial law, has been fully set forth in many statutes, and the acknowledged prerogative of the crown, to resort to the exercise of martial law against open enemies or traitors, is expressly declared in several earlier statutes, and among others, in the more recent Irish disturbance act which expired August 1st, 1834.†

In the *United States*, martial law is a thing not mentioned by name, and scarcely as much as hinted at, in the constitution and statutes. The former declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." And the opinion is expressed by the commentators on the constitution, that the right to suspend the writ of *habeas corpus*, and also

* General order, No. 287. Head-quarters of the army, National Palace of Mexico, September 17th, 1847

† Simmons' Courts-Martial, p. 15.

that of judging when the exigency has arisen, belong exclusively to Congress. But the rebellion or invasion may demand such suspension during a recess of the national legislature, and, by the laws of war, the executive has then the right to assume the power for the public safety. The relation between the proclamation of martial law and the suspension of the writ of *habeas corpus*, is extremely intimate; although it is but one of its consequences, and by no means the largest or gravest, since, according to every definition of martial law, it suspends, for the time being, all the laws of the land, and substitutes in their place no law, that is, the mere will of the military commander.

**Definition.** *Martial law*, then, is that military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations in carrying on the war, and which extinguishes or suspends civil rights, and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purpose of the war, the party who exercises it being liable in an action for any abuse of the authority thus conferred. It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military law or military action.*

**How executed.** In carrying on war in a portion of country occupied or threatened to be attacked by an

* North American Review, October, 1861.

enemy, whether within or without the territory of the United States, crimes and military offences are frequently committed, which are not triable or punishable by courts-martial, and which are not within the jurisdiction of any existing civil courts. Such cases, however, must be investigated, and the guilty parties punished. The good of society and the safety of the army, imperiously demand this. They must, therefore, be taken cognizance of by the military power; but, except in cases of extreme urgency, a military commander should not himself attempt to decide upon the guilt or innocence of individuals. On the contrary, it is the usage and custom of war, among all civilized nations, to refer such cases to a duly constituted military tribunal, composed of reliable officers, who, acting under the solemnity of an oath, and the responsibility always attached to a court of record, will examine witnesses, determine the guilt or innocence of the parties accused, and fix the punishment. This is usually done by courts-martial; but in our country, these courts have a very limited jurisdiction, both in regard to persons and offences. Many classes of persons cannot be arraigned before such courts for any offence whatever, and many crimes committed, even by military officers, enlisted men or camp retainers, cannot be tried under the "rules and articles of war." Military commissions must be resorted to for such cases, and these commissions should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise.

Civil offences cognizable by civil courts, whenever

such loyal courts exist, will not be tried by a military commission. It should therefore be stated in every application for a commission, whether or not there is any loyal civil court to which the civil offence charged can be referred for trial. It must be observed, however, that many offences which in time of peace are civil offences, become in time of war military offences, and are to be tried by a military tribunal, even in places where civil tribunals exist.*

* G. O., No. 1. Head-quarters, department of Missouri, January 1st, 1862.

## CHAPTER II.

## CONSTITUTION AND COMPOSITION OF COURTS-MARTIAL.

In conformity with the authority conveyed by the rules and articles of war, certain officers, therein specified, are empowered to convene *general*, *regimental*, and *garrison* courts-martial; the composition of the several courts, whatever their jurisdiction, being distinctly stated and defined.

**General Courts-Martial** may be appointed by any general officer commanding an army, or colonel commanding a separate department,* and in time of war by a commander of a division or separate brigade.† This, of course, includes the President of the United States, who is, by the constitution, the commander-in-chief of the army and navy, and, therefore, the first general of the confederacy; though this power is first given to him in terms by the act of May 29th, 1830, in the case when a general officer commanding an army, or a colonel commanding a separate department, shall be the accuser or prosecutor of any officer of the army of the United States under his command. When the division or brigade commander shall be the accuser or prosecutor, the court shall be appointed by the next higher commander.

* 65th article of war.

† Act approved Dec. 24th, 1861.

**Regimental Courts-Martial** may be appointed by every officer commanding a regiment or corps; and **Garrison Courts-Martial** by all officers commanding any of the garrisons, forts, barracks, or other places where the troops consist of different corps.*

**The Warrant** for the assembling of a court-martial is issued in the form of an order, by the officer specially empowered by the law. The English "Mutiny Act," from which our articles of war are mainly derived, provides for the delegation of this power to inferiors, by those who have the right of appointing courts-martial, but as no such power is authorized by our laws, the practice formerly in vogue has been very properly prohibited. And, indeed, the practical operation of the acts, above cited, of May 29th, 1830, and December 24th, 1861, would prove of no effect were such a course of procedure recognized. It has therefore been decided that he alone, to whom the law has given the authority to act in such cases, must appoint the court; and that no right to delegate such authority can be exercised without the express sanction of law.†

A general court-martial having expressed a doubt as to the *regularity of the order* by which it was convened, on the ground that the secretary of war was not competent to render such an order, the question was duly considered by the secretary and president, and the result was, that they entertained no doubt of the perfect regularity of the order. Their decision embodied the following considerations: Although the President cannot delegate his powers, he need not in all cases exercise them in proper person. In the language of Mr. Wirt,

* 66th article of war.

† Captain McK's. case, August, 1845.

attorney-general (opinion July 6th, 1820): "The orders issued by the heads of departments are, in contemplation of law, not their orders, but the orders of the President of the United States, and it is as manifest a breach of military subordination to dispute the orders of the heads of these departments, as if they proceeded from the President in person." In the case of the United States *vs.* Eliason, the Supreme Court say: "The secretary of war is the regular constitutional organ of the President for the administration of the military department of the nation, and rules and orders publicly promulgated through him, must be received as the acts of the executive, and as such be binding on all within the sphere of his legal and constitutional authority," and in the case of Wilcox *vs.* Jackson, the Supreme Court say: "We consider the act of the war department as being, in legal contemplation, the act of the President."

The practice of the heads of departments conforms to this theory. They daily issue in their names, orders emanating from the President, and although it is sometimes stated in the order itself, that it is issued by direction of the President, this is not always done, and when it is not, the fact is presumed.*

**Commissioned Officers.** It is prescribed by the law that courts-martial must be composed exclusively of "commissioned officers."†

*Chaplains, Surgeons, &c.* In interpreting the words "commissioned officers," as applicable to persons eligible as members of courts-martial, it has been the custom of service to exclude from that class, all surgeons, assistant-surgeons, and paymasters, and indeed every one

* War department, Oct. 30th, 1850. † 64th and 66th articles of war.

who is not clothed with military rank proper, and having thereby an inherent right of command. This is thought to be in strict consonance with the purposes intended by law. It would certainly seem somewhat anomalous to institute a court for the trial of military offences, and appoint as judges, persons who, from their duties in connection with the army, from their previous pursuits and education, and the manner in which they are introduced into the service, can have but a very limited knowledge and doubtful views of military conduct.*

Simmons† states that instances may be quoted where paymasters and also surgeons and assistant-surgeons have been required to perform this duty; but the custom and convenience of the service forbid recourse being had to these staff-officers except in urgent circumstances, notwithstanding that, in the performance of their duties these officers become acquainted with the rules that apply to military subordination and discipline.

In our service this question has, however, been set at rest by the opinion of Hon. J. McP. Berrien, attorney-general, of November 6th, 1829, given in answer to the query: "Whether *chaplains, surgeons, or pursers*, who are regarded on board our ships as non-combatants, are competent to officiate as members of a naval court-martial?" He says: "If we look to the origin of courts-martial in England (from whence we borrow them), it would be difficult to believe that a tribunal which has succeeded there to the ancient court of chivalry, could be composed of other than military men. And if we consider the nature of the subjects which are generally submitted to the decision of these tribu-

* De Hart, p. 38. † p. 8.

nals, the knowledge of military discipline and usage, and frequently of tactics (which is indispensable to those who preside there), it would seem that non-combatants, whose duties do not lead them to acquire this species of information and who have no rank, either real or assimilated, could not be deemed competent to sit on courts-martial."

The question was at one time discussed, whether *graduated cadets* with the brevet rank of second lieutenants, and attached as supernumerary officers to corps of the army, were "commissioned officers" within the meaning of the articles of war that prescribe such as the only persons eligible to sit as members of courts-martial. The opinion of Mr. Attorney-General Berrien, of August 17th, 1829, ruled that they were not such commissioned officers. This opinion was never fully acquiesced in, and the subject was subsequently settled by orders from the war department in the following words: "Under this act (April 29th, 1812), the President is not required either to commission such graduate when there is a vacancy, or to attach him as a supernumerary officer by brevet of the lowest grade when there is no vacancy, but he may do so at his discretion, and having exercised that discretion, such graduate, so commissioned and attached, becomes an officer of the lowest grade in the corps, and is entitled to all consideration as a commissioned officer."*

In July, 1855, this question again became the subject of official interpretation, and Mr. Attorney-General Cushing's opinion upheld the above decision as follows: "He is designated by 'brevet of the lowest grade as

* General order No. 11, April 15th, 1845.

a supernumerary officer.' What in fact thus happens? It is, that he is appointed 'brevet second lieutenant,' with the pay and emoluments of that grade—and although the statute does not here say it, yet the general law says, with the *military power* of a second lieutenant, for service in garrison, camp, or field, and also with the rights and privileges of a second lieutenant. But is he a 'commissioned officer?' I say, yes: commissioned with a brevet commission, to be sure; but still commissioned as an officer upon nomination to and confirmation by the Senate. * * * On these considerations, it seems to me indubitable, that a cadet with brevet of second lieutenant is a commissioned officer; that he can be tried as a commissioned officer; and that he is legally capable as a commissioned officer to try."

Whenever it may be found convenient and necessary to the public service, it is provided, that the *officers of the marines* shall be associated with the officers of the land forces, for the purpose of holding courts-martial, and trying offenders belonging to either.* It is also provided, that the officers and soldiers of any troops, whether *militia* or others, being mustered and in pay of the United States, shall, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial; but such courts-martial shall be composed entirely of militia officers.†

**Number of Members.** The 64th article of war enacts that *general courts-martial* may consist of any number

* 68th article of war.

† 97th article of war, and act approved July 29th, 1861, section 5.

of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

A question has been raised whether a general court *of less than thirteen members is a legal court*, in case that number could have been convened without manifest injury to the service. It may be difficult to conceive an emergency in time of peace, so pressing, as to disable the general officer ordering the court from convening thirteen commissioned officers *without manifest injury to the service.* And if a smaller number act without such manifest emergency, they are not a lawful court, and an execution under their sentence would be murder.* And yet this law makes provision as to the number of officers to be ordered on a general court-martial, but none as to the number who must actually attend and participate in its proceedings beyond a fixed minimum. No law or regulation requires all the members of the court who participated in its original proceedings, to continue present until the time of their conclusion. Objections to competency may diminish the original number. So may sickness, death, or the same exigencies of the service, which authorize the original appointment of a number less than thirteen. Still it is a lawful court.† The article indubitably grants to the appointing power the exercise of a wise discretion, and nothing short of clear and indisputable evidence of a wilfully corrupt intention could invalidate his act. The law was made sufficiently flexible to conform, as near

* Wirt's opinion, August 29th, 1819.

† Attorney-general's opinions, July 12th, 1855.

as possible, to the constantly varied necessities of the service, and not intended by its rigid exercise to make the public good subservient to individual interest.

The interpretation of the law, by the highest legal and judicial authority, is expressed in the opinion of Justice Story of the Supreme Court, in the case of Martin *vs.* Mott, when it was decided that "the direction contained in the act of 1806, that a general court-martial 'shall not consist of less than thirteen, when that number can be convened without manifest injury to the service,' is merely directory of the officer appointing the court; and his decision as to whether that number can be convened without manifest injury to the service, being in a matter subjected to his sound discretion, must be conclusive."*

When in the opinion of the proper authority, the circumstances of the case demand a full court, or one composed of the maximum number of thirteen to pass judgment, it is the custom to name *supernumerary officers* who can replace absent regular members, or vacated seats, during any stage of the proceedings, in order to prevent delays and the repetition of labor—as also any interruption in the course of the trial.

When the *number* of members to form the court is *not specified*, the court is fully competent to proceed, provided it does not fall below the minimum fixed by law.

**Regimental Courts-Martial** are to consist of three commissioned officers, to be appointed for his own regiment or corps by every officer commanding the same.†

**Garrison Courts-Martial** are to consist of three com-

* 12 Wheaton, 34, 35.

† 66th article of war.

missioned officers, to be assembled by all officers commanding any of the garrisons, &c., where the troops consist of different corps.*

**President of the Court.** It was formerly the practice (and is still so, by law, in the British service), in the order convening a court-martial, to name the senior in the detail as the president of the court, but this was found not at all necessary, as the officer highest in rank has the right to preside.† Besides, if the president be specially named in the warrant, and his attendance be prevented by accident, or by challenge of the accused, the court cannot proceed until the officer ordering the court supplies his place; a necessity which, in the scattered condition of our troops on the frontier, would lead to serious and inconvenient delays. As our laws make no mention of such a functionary, and the practice has proved an evil, the custom of appointing a president to a court has been discontinued—the senior member present, by virtue of his rank being the presiding officer.

**Rank of Members.** The 75th article states that no officer shall be tried by officers of an inferior rank, if it can be avoided. This is the only limitation as to degree of rank necessary in constituting a court-martial, and, equally with the number to be convened, is discretionary with the appointing power.

* 66th article of war. † 61st article of war.

## CHAPTER III.

## JURISDICTION.

The right of personal security, is guarded by provisions which have been transcribed into the constitutions in this country from Magna Charta, and other fundamental acts of the English Parliament; and it is enforced by additional and more precise injunctions.* The substance of these provisions is to be found in the fifth and sixth amendments of the constitution. By the fifth amendment it is declared that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The constitution, therefore, while expressly empowering Congress "to make rules for the government of the land and naval forces,"† expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law.

Together with this exception, courts-martial are more-

* 1 Kent's Commentary, p. 618. † Article 1, section 8.

over restricted to the cognizance of offences declared by, or under, the powers of the act of 1806, the general regulations of the army and the custom of war; committed within the limits of time therein specified by persons subject to military law; the penalties depending on the rank of the individual by whom offences may be committed, and varying also according to the powers of the court by which they may be adjudicated.

Accordingly, no doubt is intimated in any of the books of our law as to the competency and *completeness of the jurisdiction of courts-martial* in the cases and under the conditions provided by articles of war. (Serg. on const., p. 130.) And in the great case of Moore *vs.* Houston (1 Wheaton, p. 1), where a majority of the judges maintained the validity of proceedings by courts-martial, established by the states, applicable to the militia, the reasoning of all the judges, on both sides of the question, is conclusive as to the completeness of the jurisdiction of courts-martial under the authority of the United States.

In the different states the constitutionality of the jurisdiction of courts-martial has been affirmed, directly or indirectly, beyond all controversy or cavil. (See Rawson *vs.* Brown, 6 Shepley, p. 216; Brent *vs.* Bogardus, 7 Johns., p. 157.*)

It is enacted by the 88th article of war, that no person shall be liable to be tried and punished by a general court-martial, for any offence which shall appear to have been committed more than two years before the issuing of the orders for such trial, &c. Subject to this limitation of time, the jurisdiction of courts-martial ex-

* Attorney-general's opinion, April 7th, 1854.

tends to every case where charges are exhibited against persons to whom the provisions of the articles of war are applicable.

By virtue of the 1st article of war all commissioned officers, and of the 10th article, all enlisted men in the army are subject to the rules and articles of war.

The 96th article declares that "all officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay or hire in the service of the artillery or corps of engineers of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the other troops in the service of the United States." This article is very general in its application. It matters not whether the person be enlisted or not, nor what kind of service he may perform, provided he receives *pay* or *hire* in the service of the artillery or engineers, he at once becomes amenable to the rules and articles of war. It is by virtue of this article, as shown by Mr. Attorney-General Wirt, August 21st, 1819, that the professors and cadets at the Military Academy are subject to these rules and articles, coming as they do under the designation of "other persons whatsoever receiving pay in the service of the corps of engineers."

The 97th article also declares that "the officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall * * * be governed by these rules and articles of war, and shall be subject to be tried by courts-martial, &c."

Besides these, all the laws, with few exceptions, if any, creating or reorganizing the different corps of the

army, contain express provisions subjecting the members thereof to the rules and articles of war.

"**Art. 60.** All sutlers and retainers of the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." This description of persons, though neither enlisted nor in pay, have ever been subject to orders according to the rules and discipline of war, and whether temporarily or permanently attached to, or momentarily and accidentally connected with, an army in the field, or on the line of march, are liable, by order of the commander, to trial by court-martial for any breach of good order, whether as affecting the discipline of the army, or the private rights of individuals. The custom which prevails in the field of thus trying persons not connected with the army, must have arisen from, as it depends on, necessity;* and numerous instances might be cited where courts-martial have exercised their powers over camp-followers of all descriptions. The necessity now spoken of gave origin to the law, by which the rights on one side, and the obligations on the other, were delegated and imposed.†

**Sutlers** are persons regularly authorized by the war department, to sell provisions, merchandise, &c., to troops, subject to certain regulations and restrictions.

**Retainers to the Camp** are those who are connected with the military service by pay or fee, such as clerks, drivers, guides, &c.

**Persons Serving with the Armies** include all who derive their compensation from private sources, as servants, &c.

* Simmons, p. 34. † De Hart, p. 24.

These various descriptions of persons enjoy certain privileges in consideration of the advantages, convenience, &c., which they offer to soldiers, and entering as they do, by their own voluntary act, into a new society having peculiar laws of its own, they must conform to those laws or suffer the penalty attached to their infringement.

**Spies, &c.** Besides the persons included in the articles above cited, there are others who, for particular offences, may be tried by military courts though they should not in any way be attached to the army. This is the case with persons not owing allegiance to the United States, who shall be found lurking as *spies*, and also with any persons who shall *relieve* the enemy with money, victuals, or ammunition, or shall knowingly *harbor* or *protect* an enemy, or shall *hold correspondence* with, or give intelligence to, the enemy, either directly or indirectly.*

**Contempts of Court.** Article 76. This article gives a court-martial summary power to punish at its discretion, any person "whatsoever" who "shall use any menacing words, signs, or gestures, in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings."

It must, however, be remarked, that no contempts are thus subjected to a *summary* punishment, except such only as are of an aggravated and *self-evident* nature, which being committed in the presence of the court, do not need to be substantiated by any other evidence, and not being dependent on any constructive interpretation of the law, do not require more protracted investigation.†

* Sec. 2 and articles. 56 and 57.

† Simmons, p. 156.

Under the authority of the above-quoted article, courts-martial are, undoubtedly, fully empowered to proceed against *military persons*. The words of the article —"the said court"—are express, and the custom of service is an authority for the summary award of punishment by the court (that is, the same court, and not exposed to change by the allowance of challenges), whose proceedings may be interrupted. Judgment can be passed upon the accused without all the previous forms of trial, but the court must be sworn and a distinct charge made out—the accused being permitted to appear and make such explanations as he may desire.

In the *enforcement* of the article under consideration, courts-martial have the power to arrest the guilty party, and if an officer, even should he be superior in rank to all the members of the court.

A general court-martial is by law the highest judicial body known to the military service, and its jurisdiction is not made dependent on the rank of its members, but is co-extensive with the trial of all crimes, and all persons subject to military law. But regimental and garrison courts-martial, from their constitution, are not, in similar cases, competent to award any punishment to commissioned officers. Under such circumstances, these minor courts would only have power to arrest an officer, whatever his rank, and report the same with the cause of the arrest to the proper authority.

In the case of *civilians*, the British courts-martial are not required to award summary punishment, nor have they the power of ordering into arrest; but they may direct the removal, by force, of any person who may obstruct their proceedings, in order that he may be

"taken before the civil magistrate to be punished according to law." Our article embraces by its terms all persons "*whatsoever*," and clearly includes persons not belonging to the military profession; and as the law proceeds directly from the supreme legislative power of the country, it should have, equally with all law, inherent in itself, competent authority to secure its administration from disobedience and contempt. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.* As, however, courts-martial have no appointed means of enforcing their mandates against civilians, supposing the existence of a power to make such mandates, a procedure against them would be vain and nugatory; and yet disturbances of the proceedings of courts-martial should not pass unnoticed. Where the court sits within the limits of a garrison, or territory subject to military jurisdiction, the court can cause the offender to be ejected from its presence and put beyond the military limits. And when the court holds its sessions in towns or at places not known as military posts, such persons may likewise be put out of the presence of the court; and should further disturbance be made or attempted from the outside of the court-room, the civil authorities may be appealed to, to proceed against the offenders for a breach of the peace.†

**Court-Martial Jurisdiction after the Expiration of Term of Service.** The question—Can a court-martial exercise jurisdiction over a soldier after the expiration of the term

* 4 Black. Com., p. 285. † De Hart, p. 108.

of his enlistment, for an offence committed prior to such period?—has been frequently made the subject of discussion, and as yet no decision has been had from courts-martial or other competent military authority. The articles of war set no limit, as to time, to the jurisdiction of courts-martial, other than that declared by the 88th article. The soldier voluntarily makes an engagement with the government, in his enlistment, rendered sacred by the solemnity of an oath, "to *observe* and *obey*" the orders of the President of the United States, and the orders of the officers appointed over him, "according to the rules and articles for the government of the armies of the United States." This compact is equally binding on both parties, and can only be dissolved as prescribed by these "rules and articles." Punishments are there ordered to be inflicted for violations of the terms of the compact, and the mere expiration of the term of service should hardly release either party from the faithful performance of his share thereof. If the soldier has violated any of the articles which he swore to observe and obey, strict justice demands that he should be put square upon the record by suffering the punishment awarded for such an offence. Besides, the general principle of law is, that whenever any act is prohibited under a penalty, and no limitation affixed to a prosecution, the offender is amenable at any time during his life. If as a soldier he be subject to trial by court-martial for an offence committed while wearing the military character and subject to military law, the mere throwing off this military character and assuming the civil status cannot cleanse him from the foulness of violated law, be that law military or civil.

This is, however, but a general view of the question. Practically, two cases may arise, dependent upon the time when proceedings are commenced.

1st. When proceedings are *commenced before* the expiration of his enlistment.

A case in point arose in the navy, in January, 1830, and as it throws much light upon the principles of law involved in the discussion of this question, a few extracts from the opinion of the court are here given.

It appears that *William Walker* enlisted into the navy of the United States, on the 5th January, 1829, to serve one year; and that on the 3d January, 1830, he, being still a seaman in the navy, committed certain crimes and offences. His commanding officer, Captain Morris, immediately placed him in confinement, and on the day following, preferred charges against him to the secretary of the navy, and accordingly a court-martial for his trial was ordered on the 13th, which court was duly convened.

The accused was brought before the Supreme Court of Massachusetts, on a writ of *habeas corpus*, and his counsel moved the court that he should be discharged without delay. This motion was resisted by the opposing counsel, and after arguments from both sides had been heard by the court, a decision was given.

" * * * The motion for the petitioner's discharge from the custody of Captain Morris, is grounded upon the objections, that neither by the rules for the regulation of the navy, nor by any other statute, is it provided that any seaman should be detained beyond the period of his enlistment, for any purpose or cause whatever: * * that unless it is so provided by express statute, his officers have no authority to detain him for trial, or for any

other purpose beyond the term of his enlistment. * * Now the words of the statute do not require such a construction. It is true that a seaman is not bound to do service after the term of his enlistment. But within that term he is bound to observe the rules and regulations provided by law, for the government of the navy, and is punishable for all crimes and offences committed in violation of them during his term of service. There is no limitation of time within which he is to be prosecuted and tried for such offences, but if there were, it would be sufficient to show that the prosecution was commenced within the time of limitation.

"In this case the petitioner was arrested and put in confinement, and charges were preferred against him to the secretary of the navy, before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence—notwithstanding the time of service had expired before the court-martial had been convened. There can be no doubt, I think, that the court-martial have jurisdiction, and that they may legally proceed in the trial on the charges stated in the return. The petitioner must therefore be remanded to the custody of Captain Morris."*

Upon this decision, the accused, William Walker, was duly tried by the court-martial, upon the charges preferred against him. But it must be remembered that the above-quoted decision covers such cases, and only such, in which the prosecution has been commenced *before* the expiration of the prisoner's enlistment.

* De Hart, p. 35. American Jurist, April, 1830.

2d. When proceedings are *commenced after* the expiration of his term of service.

Our laws virtually prohibit any action to be had, in such a case, by a military court. The act of January 11th, 1812, section 21, expressly declares that, for the crime of desertion, a "soldier shall and may be tried by a court-martial, and punished, although the term of his enlistment may have elapsed previous to his being apprehended or tried," and this is the section that provides penalties "in addition to the penalties mentioned in the rules and articles of war." Such legislation on the part of the law-making power would seem to presuppose a want of jurisdiction by courts-martial, in similar cases, under the rules and articles of war, passed April 10th, 1806, and is therefore a bar to the action of military courts, except in the single case of desertion.

## CHAPTER IV.

## DISTINCTIVE JURISDICTION—OFFENCES AND PUNISHMENT.

The gravity of the offence, the rank and position of the offender, and the punishment denounced, DETERMINE THE KIND OF COURT-MARTIAL that has jurisdiction in any particular case. No garrison or regimental court-martial shall have the power to try capital cases or commissioned officers.* These cases come under the exclusive cognizance of general courts-martial; and here we find the broad distinction drawn between the superior and the two minor courts.

From the concluding portion of the 67th article it is evident that aggravated offences, though not capital, that call for severer punishment than therein stated, should not be brought before these minor courts. In deciding, therefore, upon the particular jurisdiction necessary for the trial of a certain offence, where it is left discretionary with the appointing power, the utmost care should be taken to select a court with power sufficient to try and to punish to the full measure of the law. In cases of doubt, the safe and only just rule is, to bring the offence before the superior court, that the ends of

* Article 67. Note.—"I am of opinion that cadets at the Military Academy may be tried by a regimental or garrison court-martial, according to the 66th and 67th articles of war; because they are not commissioned officers, and belong to a separate and detached corps." Opinions, May 19th, 1821.

justice may be properly met and fully satisfied. If a minor court should discover that a case before it exceeds its power to punish, its duty forces it to stay all further proceedings, and report the facts to the authority that convened it.

The only court *competent to try* every description of persons known to the rules and articles of war, and for every offence declared by them, is the general court-martial; and under the 35th article, can receive appeals from regimental courts. It has been followed as a custom and acknowledged as a principle, that while the inferior courts cannot, upon any pretence, proceed in the investigation of any description of crime which has not been explicitly stated as subject to its authority, yet the superior court can, by virtue of its grade, necessarily take cognizance of all military offences whatever;* thus including those offences that are specified in the law as expressly subject to a regimental court.† But upon the trial and conviction, in such a case, by a general court-martial, the punishment inflicted should be limited to the quantum that could be awarded by a regimental court. The law itself, by bringing those particular cases under inferior jurisdiction, has virtually fixed the maximum of punishment, in kind and degree, required to satisfy its violation, and therefore no court of superior powers should go beyond the clear intent of the law.

**Amount and Nature of Punishment.** The rules and articles of war have specified the amount and nature of punishment for many kinds of offences, and in such cases the court is left no discretion in the event of conviction.

* Adye, p. 96.

† 37th and 47th articles of war.

The sentence of *death* is prohibited by the 99th article, unless expressly authorized by the "foregoing articles of war," and there are but two cases,* where this sentence is not left discretionary with the general court, but must be inflicted upon conviction. For the crime of *desertion* the punishment of death has been restricted to time of war, by the act of Congress of May 29th, 1830; and stripes which could be awarded for this offence only, have by a recent act of Congress been entirely prohibited, in these words, "That flogging as a punishment in the army is hereby abolished."†

By the 84*th article* it is enacted, that in cases where a court-martial sentence a commissioned officer to be suspended from command, they shall have power also to *suspend his pay and emoluments* for the same period. This punishment was usual in the British army prior to 1815, but the necessary inconvenience to the service arising from the temporary withdrawal of officers from its active duties, caused its abandonment. Suspension from rank and pay, besides its injurious effects upon the service at large, acts unequally upon individuals, and may, in its results, inflict the severest punishment in loss of rank upon those least obnoxious to such severity. Forfeiture of pay to an officer of abundant private means may prove but a trifling loss, compared to the terrible deprivation to one who may be exclusively dependent upon it. The utmost care ought, therefore, to be had in the exercise of this power, as it might in many instances be productive of evil, and defeat the very ends for which the law was enacted.

* Article 55th, and 2d section, article of war.

† Act approved August 5th, 1861.

To *remedy*, if possible, the ill effects of enforcing the requirements of this article, the President recently directed, in general orders,* that general courts-martial, before which the question may properly come, be invited to consider whether an effectual and appropriate penalty may not be inflicted without injury to the service by adjudging a certain loss of rank, instead of a suspension from rank for a period of time, the effect of which upon the officer is not certain when the sentence is pronounced, but which must operate to the prejudice of the service in removing an officer from duty.

Non-commissioned officers can be *reduced to the ranks* for certain offences specified in the 39th and 48th articles; and the custom of service has extended the exercise of this authority, so that general, regimental, and garrison courts do not limit the application of this punishment to these two articles. This right is fully confirmed by the general regulations for the army,† and its exercise may be often necessary, as non-commissioned officers cannot be imprisoned or suffer corporeally, before reduction.‡

Regimental courts-martial have, by the 35th article of war, been confided with the special power to investigate complaints of soldiers against their captains or other officers, but as this authority is not punitive in its nature, the limited jurisdiction conferred by the 67th article is not affected thereby.

*Article* 67 declares that garrison and regimental courts-martial shall not inflict a fine exceeding one month's pay, nor imprison nor put to hard labor for a longer period than one month. This is then an acknowl-

* No. 43, Dec. 22d, 1852. † Par. 79. ‡ Par. 78.

edged military punishment, which can also be exercised by a general court-martial at its discretion. The principle observed by civil courts also applies, that "where an offence exists, to which no specific punishment is affixed by statute, fine and imprisonment is the punishment."*

Discussion has arisen as to whether a minor court-martial can take cognizance of offences under the 38th article. The total amount of stoppage of pay, and confinement, and corporeal punishment under the article is not limited, and as this stoppage of pay is tantamount to the "fine" declared in the 67th article, the jurisdiction of the minor courts must be confined to cases that come under the general rule limiting them to the infliction of a fine not exceeding one month's pay, &c., and any offence that demands a severer punishment will require a general court-martial for its trial.

**Offences.** I. The offences over which a general court-martial alone has cognizance, are:

Art. 27. In case of quarrels, frays, &c., for refusing to obey an officer (though of an inferior rank), or drawing a sword upon him.

Art. 52. Misbehaving before the enemy, shamefully abandoning his fort, post, &c., casting away his arms, quitting his colors to plunder and pillage.

Art. 53. Making known the watchword to any person not entitled to it, &c.

Sec. 2. In time of war, persons not citizens of, or owing allegiance to, the United States, who shall be found lurking as spies, &c.

II. The offences against which penalties are de-

* Kent, 370.

nounced exceeding the power of regimental and garrison courts-martial to inflict, are:

Art. 7. Beginning, exciting, causing, or joining in any mutiny or sedition.

Art. 8. Being present at a mutiny and not endeavoring to suppress the same, &c.

Art. 9. Striking or offering any violence against a superior officer, or disobeying any lawful command of his superior officer.

Art. 21. Desertion.

Art. 22. Enlisting in any other regiment, troop, or company, before being regularly discharged.

Art. 23. Advising or persuading to desert.

Art. 38. Selling, losing, or spoiling through neglect, his horse, arms, clothes, &c.

Art. 46. Sentinel sleeping on post.

Art. 51. Doing violence to any person who brings provisions, &c., into camp, when the forces are employed out of the United States.

Art. 55. Forcing a safeguard in foreign parts.

Art. 56. Relieving the enemy, or knowingly harboring and protecting him.

Art. 57. Holding correspondence with, or giving intelligence to the enemy.

Art. 59. Compelling a commander to surrender.

In addition to the above, general courts-martial have exclusive jurisdiction in the trial of commissioned officers.*

**Punishments.** Punishments of every description, which may be inflicted by sentence of either civil or military courts, are regulated in kind and degree by the

* Article 75.

restraining provision of the eighth article of the amendments to the constitution, which declares that "excessive fines shall not be imposed, nor cruel and unusual punishments inflicted." Punishments are *cruel* when they are vindictive in their character, going, both in kind and degree, beyond the intention and necessity of their infliction for the vindication of law; they are *unusual*, in kind only, when unknown to the statutes of the land, or unsanctioned by the customs of the courts.*

Where the punishments for particular offences are not fixed by the law, but left discretionary with the courts, the above mandate of the constitution must be strictly kept in view, and the benign influence of a mandate from a still higher law ought not to be ignored, that justice should be tempered with mercy.

The punishments for military offences, applicable to *officers*, as fixed by the rules and articles of war or the custom of service, which general courts-martial may award on conviction, are:

*Death*, in cases specially mentioned in the law.

*Cashiering*, accompanied with the declaration that he shall thereby be utterly disabled to have or hold any office or employment in the service of the United States.

*Cashiering*, simply.

*Dismissal.*

*Suspension* from rank and pay.

*Confinement.*

*Reprimand*—public or private.

In the British service a marked difference really exists between *cashiering and dismissal as punishments*, as is shown by the general order promulgating the sentence

* De Hart, p. 68.

of Captain Barnes, of the 89th regiment, which states that "his royal highness has not considered it expedient to give effect to the recommendation of the court in the prisoner's behalf, further than to mitigate the term of *cashiering* into that of *dismissal from his majesty's service*." *

This distinction is held to be correct by many in our service, and with reason, as our articles have been drawn, sometimes bodily, from the British mutiny act and articles of war. Our articles, however, make no such distinction in terms, nor with regard to the greater or less gravity of offences for which these are imposed,—wherever future disability to hold office is intended, such intention is clearly expressed. In framing the law, cashiering and dismissal were denounced in certain articles, because contained therein when copied from the British as they undoubtedly were, and the difference in meaning, therefore, can only be based on the custom of the British service.

The legal punishment for *soldiers* by sentence of a court-martial, according to the offence, and the jurisdiction of the court, are: death; confinement; confinement on bread and water diet; solitary confinement; hard labor; ball and chain; forfeiture of pay and allowances; discharges from service; and reprimands. Solitary confinement, or confinement on bread and water, shall not exceed fourteen days at a time, with intervals between the periods of such confinement not less than such periods; and not exceeding eighty-four days in any one year.†

*Non-commissioned Officers* may be reduced to the

* Simmons, p. 291. † General Regulations, par. 895.

ranks by the sentence of any court-martial, and in addition are subject to any of the above-mentioned punishments which may be awarded to soldiers. However, where a non-commissioned officer is to be punished by confinement, hard labor, or ball and chain, he must first be reduced, as it is contrary to the principles of the service, and derogatory to the dignity of their position, to cause non-commissioned officers to be thus punished.

The punishments, therefore, which a court-martial may sentence a prisoner to suffer, are clearly understood, and are derived from express statute or the custom of war. Should it happen that an offence falling within the jurisdiction of a court-martial, be not provided for by a special penalty, but left to be determined by the discretion of the court, such sentence must be in accordance with the common law of the land, or the custom of war in like cases; a departure from this would make the sentence unusual, and as such, unlawful.*

* De Hart, p. 195.

## CHAPTER V.

## ARREST AND CONFINEMENT.

**The 77th Article of War** directs that "whenever an officer shall be charged with a crime, he shall be arrested and confined in his barracks, quarters, or tent, and deprived of his sword by the commanding officer," thus describing the preliminary steps to be taken for the prosecution of offences. "And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior officer, shall be cashiered."

Although the law makes no mention of any difference in the nature of arrests in order to trial, a difference is established by the custom of the army according to the degree and measure of the offence. An officer accused of a capital crime, or any offence of which the penalty is so severe as to afford a natural temptation to escape from justice, ought to be detained in a state of confinement, as secure as the closest civil imprisonment. If the offence is of a lighter nature, the presumption is, that the officer whose character is thus impeached must be solicitous to obtain a judicial investigation of his conduct,* and he is therefore, either placed in close arrest, that is, limited to his quarters or tent; or allowed to be in arrest at large, that is, with limits ex-

* Tytler.

tended to the garrison, camp, or other defined boundaries.

The general regulations provide that in ordinary cases, and where inconvenience to the service would result from it, a *medical officer* will not be put in arrest until the court-martial for his trial convenes. They also provide that officers are not to be placed in arrest for slight offences, and that close confinement is not to be resorted to unless under circumstances of an aggravated character.*

The depriving an officer of his sword, as directed in the article, is generally omitted, but is, nevertheless, considered to have taken place, and it is invariably the custom for an officer in arrest to appear without his sword. The arrest is usually imposed by the commanding officer himself, or through the ministration of his staff officer, and their mere verbal order to that effect is sufficient to prevent him from exercising even the minor functions of his office.

**Breach of Arrest** is described by the article, as leaving his confinement before he shall be set at liberty by proper authority, and *cashiering* is denounced as the penalty, leaving to courts-martial no discretion whatever. The variety of opinions that have been held as to the exact meaning and import of what constitutes breach of arrest, are not founded upon the clear and explicit words of the statute. Cashiering is affixed to the offence of "leaving his confinement," in express terms, and to no other offence; and not even by implication can any other misdemeanor be presumed as flowing from the plain wording of the law. The assumption of command, wearing a sword, or visiting officially his commanding

*Par. 222, 223 and 224.

officer unless sent for, while in arrest and within his limits, are evident improprieties prohibited by the general regulations of the army, and therefore liable to punishment; but they are not breaches of arrest, unless in the words of the article, he "leaves his confinement before he shall be set at liberty by his commanding officer, or by his superior officer." The practice of the British service upholds this view of the question. A case is cited, in which "Lieutenant Naylor was cashiered for breaking his arrest; and Lieutenant Williams was cashiered for, that he, when commanding a guard over a prisoner committed to his charge, did allow such prisoner to leave his place of confinement."*

The 27th article enacts that all officers of what condition soever, have power to part and quell all "quarrels, frays, and disorders," and to order officers in arrest, even though the latter be of superior rank. "Officers of what condition soever," includes non-commissioned as well as commissioned officers; and the law requires implicit obedience on the part of all those who, by their conduct, render themselves amenable to the exercise of such extraordinary powers by a junior. The assumption of a present command by the inferior, is tolerated rather than that the military state should be endangered by violent evils, which, if not instantly repressed, might result in irremediable mischief. This assumption is not, however, allowed to continue longer than the necessity itself exists, that is, until the superior officer of the parties arrested can be made acquainted with the circumstances.†

The authority of this article can and should be ex-

* Simmons, p. 120. † O'Brien, p. 108.

tended to any glaring impropriety, such as drunkenness on parade, that properly comes under the head of disorders. It was decided by high authority in the British service, that circumstances may occur even upon parade, to justify a junior officer in taking upon himself the strong responsibility of placing his commander in arrest; such a measure must alone rest upon the responsibility of the officer who adopts it, and there are cases wherein the discipline and welfare of the service require that it should be assumed.

By virtue of the 78th article, "non-commissioned officers and soldiers charged with crimes, shall be confined until tried by a court-martial, or released by proper authority." A distinction necessarily exists between the nature of the arrest of officers and of soldiers—the same security for his appearance on trial not existing in the two cases. By the general regulations of the army, non-commissioned officers are not to be sent to the guard-room and mixed with privates during confinement, but be considered as placed in arrest, except in aggravated cases where escape may be apprehended.* With private soldiers, confinement is the usual mode of securing their persons.

The 80th article ordains that "no officer commanding a guard, or provost marshal, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged."

The requirements of this article are unmistakable, and

* Par. 78.

the proviso would seem to admit the right of the officer of the guard, to reject a prisoner when no written statement of the crime charged was submitted. But the interpretation given in the English army, seems more in unison with the demands of the service and the dictates of common sense. In that service, the omission to make the written statement, or deliver in *a crime* as it is usually termed, would not justify the rejection or release of a prisoner, or exempt the officer of the guard from liability to the penalties attached to the 81st article. It may sometimes be impracticable to make the written statement on the instant, and certainly the committing officer should be allowed reasonable time in which to prepare it; and as the general regulations* expressly direct that all prisoners under guard, without written charges, shall be released by the officer of the day at guard-mounting, no person confined without cause could suffer, at the worst, the inconvenience of durance vile for a longer period than twenty-four hours. To prevent illegal confinement is indubitably the intention of the article, and the safe rule to be observed is, not to receive a prisoner without a written statement, unless he is amenable to military law, and is committed by an officer who is well known to the officer of the guard as having authority to do so.

**The 79th article** declares that "no officer or soldier who shall be put in arrest shall continue in confinement more than eight days, or until such time as a court-martial can be assembled."

The object and intent of this article is to deprive the commanding officer of the right of imposing confine-

* Par. 216, ed. 1857.

ments, except for trial, beyond the period of eight days. It allows time for the examination of the facts and circumstances of his case, so as to decide whether or not it be one that demands judicial investigation. The prisoner may be released at any time short of the term of eight days, without trial, but the article is decided that confinement beyond that period must continue until a court-martial can be assembled.

It has long been a settled principle both in the British service and our own, that no officer has a right to *demand a court-martial* on himself or others—the authority competent to order the court being the judge of its necessity; nor after having been arrested has he a right to demand a trial, or persist in considering himself in arrest after he shall have been released by proper authority. If, however, the officer should think himself aggrieved by the arrest, or by charges that might have been preferred against him and afterward withdrawn, he may in either case seek redress under the 34th article of war.

## CHAPTER VI.

## CHARGES AND SPECIFICATIONS.

**A Military Charge** is a plain, brief, and certain narrative of the offence committed, and of the necessary circumstances that concur to ascertain the fact and its nature.* It is of two parts: the charge, and the specifications. The *charge* designates the crime, or offence in law, as mutiny; the *specification* alleges or specifies the act, with time, place, and circumstance.

**Charge.** "The commander who prefers a charge may, in the exercise of a just and legal discretion, when the act may fall under different articles of war, elect under which to charge it, or may charge it variously as in the several counts of an indictment. But under whatever article a charge is laid, the specification to it must state the act in terms appropriate to that article, and not in terms which necessarily refer to some other article; and where the act cannot be stated or described except in the language of a particular article of war, the charge is confined to that article. In this regard, the rule of pleading is not merely technical, but is essential to the legal statements of offences. Some writers on military law have laid the rule down so strictly, as to disallow any resort to the general article in cases of offences specified in the other articles. "*When an offence is of that specific*

* Lord Hale.

*quality as to be reducible to a particular article of war, to which a known and distinct penalty is attached, it must be prosecuted under such article, that the intent of the law and the purposes of justice may be answered.*" Samuel and Hough. They consider that in such cases the law restrains the discretion of commanders and courts, and that the general article "*holds out not a substitute but a substantive course of prosecution for offences not otherwise declared.*"

If the rule does not obtain so strictly in our service, still a specification appropriate to a particular article only, cannot be laid under the general article to evade the penalty prescribed in the particular article."*

For instance, an offence may be charged under the general article, the 99th, and triable by a garrison court-martial, when the specification sets out in distinct terms an act in violation of the 46th article of war, a capital offence, and only triable by a general court-martial. This may be done to avoid the consequences that follow the violation of the particular article, which course of procedure is very properly prohibited by the above decision. When, therefore, the specified facts and circumstances clearly point to a particular article, with a distinct penalty attached, the prosecution must be had under that article, and the *charge should be expressed in the terms used therein;* but where the offence alleged is a mere disorder or neglect, not specifically provided for, it must be charged under the general article as "conduct to the prejudice of good order and military discipline."

The settled usage of military courts permits a prisoner

* G. O. No. 18, war department, July 23d, 1859.

to be placed on his trial, for *several distinct offences at the same time.* In such cases, each distinct offence must be made the burden of a separate charge and its specification, although but one sentence is adjudged for all the offences tried upon one arraignment. But distinct offences on separate trials by the same, or by different courts, may each receive its appropriate penalty.

**Specifications.** The specifications—one or more—to the charge, must be:

1st. **Brief, clear and explicit.** All the ingredients of the offence with which the accused is charged, the *facts, circumstances and intent* constituting it, must be set forth with certainty and precision, without any repugnancy and inconsistency, and the accused charged directly and positively with having committed it.* As every crime or offence consists of certain acts done or omitted, under certain circumstances, it does not suffice that the prisoner be charged *generally* with having committed it, but all the facts and circumstances must be set forth *specifically*, and the offence must appear on the face of the specification to be a distinct substantive offence.

*Particularity of description* would seem to be for the interest of the party accused, if he be innocent, or of doubtful guiltiness, and for the interest of the service if he be guilty; and therefore advantageous on both sides. It would enable the accused to determine the species of offence for which he is to be tried, and prepare his defence accordingly; and subsequently empower him to plead an autrefois acquit or autrefois convict in bar of another prosecution for the same offence.

Besides this, *facts* which are *distinct* in their nature,

* Archbold's Criminal Pleadings, p. 6.

should be set forth under separate and distinct specifications.

As to the *certainty and intent* of the specification, the meaning of the words must be construed according to their ordinary and usual acceptation, and technical terms according to their technical meaning. The weight to be attached to any technical terms used, must depend upon the importance given to them by previous decisions in the practice of courts. If the sense of a word be ambiguous in the ordinary acceptation of it, it should be construed according as the context and subject matter require it to be, so as to render the whole sensible and consistent.

Written instruments, where they form a part of the *gist* of the offence charged, must be set out verbatim. Where part only of a written instrument is included in the offence, that part alone is necessary to be inserted.

The *intention* of the party at the time he committed the offence is often a necessary ingredient of it; and in such cases it is as necessary to state it, as any other of the facts and circumstances which constitute the offence.

In cases where the offences are created by statute, the statute contains a definition of the offence; and the offence consists of the commission or omission of certain acts, under certain circumstances, and in some cases, with a particular intent. A specification therefore, for an offence against the statute, must declare the accused to have committed or omitted the acts under the circumstances, and with the *intent* mentioned in the statute. This can be best effected by the strict use of the very words of the law, thus precluding all question as to the

expression intended; although it is held, that where a word not in the statute is substituted for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification, and includes it, the specification will be sufficient.*

2d. **Certain as to the Party accused.** The accused must be described by his rank, Christian name, surname, and the company, regiment, or corps to which he belongs. The surname may be such as the accused has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added after an *alias dictus*, thus *John Smith otherwise called John Brown.*

Where the *identity* of a prisoner fully and indisputably appears, it is quite immaterial whether he is tried by his real name or by a fictitious one, or by both names under an *alias.* If the circumstances of his having been known by different names have arisen from mere mistake or from accident, the law will not permit such mistakes or accidents to defeat the ends of justice. But if he has designedly assumed a false name for a sinister purpose, then the maxim applies, that no man, whether in a criminal proceeding or elsewhere, shall be allowed to avail himself of his own wrong.†

3d. **Certain as to the Person against whom the Offence was committed.** In the case of offences against the persons or property of individuals, the Christian name and surname, with rank and addition if he has any, must be stated if the party injured be known. Should, however, the name of the injured party be unknown, he

* Archbold's Criminal Pleading, 15, 25.

† Judge Advocate General Sir Robert Grant.

may be described as a person *unknown*. Such cases may arise under the 32d and 33d articles of war.

4th. **Certain as to Time and Place.** Every material fact specified must be alleged to have been done on a particular day, and at a particular place. An offence of omission cannot indeed be said strictly to have been committed at any time or place, unless the law violated state a certain time and place, when both should be specified. But in offences of commission, every act which is a necessary ingredient of it, must be laid with time and place. This is the rule as laid down for courts of criminal jurisdiction, and should be followed by courts-martial as closely as the circumstances of each particular case will admit. In the practice of courts-martial, some degree of latitude is, however, allowed, though minuteness and precision are required whenever it is possible to be thus particular.

It is always possible to state the circumstance of *place* with much more exactness, and this should not be dispensed with in the framing of specifications. When doubts are indulged as to the precise time and place, the act may be specified as committed "at or near such a place," and "on or about such a day." The rule recently fixed for the guidance of our courts-martial is that, although in the specification to charges, time and place ought to be laid with as much certainty and truth as may be practicable, still it is sufficient in law to prove the offence to have been committed at any other place and time within the jurisdiction of the court.*

The following *case of Captain Trenor* will aid in exemplifying the foregoing:

* G. O. No. 16, war department, June 9th, 1853.

"*Charge* 2*d*. Drunkenness on duty."

"*Specification*. In this, that the said Captain Eustice Trenor, of the 1st regiment of dragoons, when on duty as officer of the day, at Fort Leavenworth, between the 1st day of September and the 31st day of December, 1840, was drunk."

On being arraigned the accused pleaded as follows: Captain Trenor "declines pleading to the 2d charge and its specification, inasmuch as it includes such a length of time as to prevent the possibility of either disproving it, or defending himself against it, and he therefore hopes the court will not entertain it."

The objections of the accused being sustained by the court, the 2*d charge* and its *specification* were accordingly thrown out. The proceedings in the case were submitted to, and approved by the President of the United States.*

Considering that the trial of this case did not take place until December, 1841, one year and more after the time when the offence was alleged to have been committed; that the wide range of time—four months—in specifying the act was unnecessary, in a matter of detail for officer of the day, which is always upon record; and that it is highly reprehensible to accumulate accusations against an officer; the decision of the court was undoubtedly correct.

* G. O. No. 4, war department, January 31st, 1842.

## CHAPTER VII.

## OF THE COURT AND PARTIES TO THE TRIAL.

The discipline and reputation of the army are deeply involved in the manner in which military courts are conducted, and justice administered; and the duties of officers appointed to sit as members of courts-martial are of a grave and important character.

**The President** of a court-martial, besides his duties and privileges as member, is the organ of the court, to keep order, and conduct its business. In all their deliberations, the law secures the equality of the members.

The 76th article of war does not confer on a court-martial the power to punish its own members. For disorderly conduct, a member is liable as in other offences against military discipline—improper words are to be taken down, and any disorderly conduct of a member reported to the authority convening the court. *

**Responsibility of Members.** Although the proceedings of a court-martial, duly constituted and organized, cannot be dictated to, or interfered with, by the highest military authority, yet the members thereof are collectively and individually responsible to the federal courts of civil judicature for any abuse of power or illegal proceedings. McArthur cites the case of Lieutenant Frye, of the Marines, in 1743, who received from a civil court

* General regulations, par. 888 and 889.

a verdict in his favor for £1,000 damages, against the president of a court-martial which had convicted him on illegal evidence—the depositions of illiterate persons reduced to writing several days before the trial. The judge moreover informed him, that he was still at liberty to bring action against any of the *members* of the court-martial.

In Great Britain, the superior courts of common law exercise a supervisory or quasi appellate jurisdiction over military courts. What relation the Supreme Court, or other courts of the United States, have to courts-martial, is a question which does not appear to have undergone adjudication in the United States. In the states, however, the relation of the ordinary courts to the military ones has been the subject of much and frequent consideration. Thus, in Massachusetts the law is settled, that parties who have legal ground to complain of the doings of military courts, are to get their remedy by action at law for damages, if they have right to any; which corresponds with the view of the Supreme Court of the United States, where trespass was maintained to recover damages for an act done by a court-martial "*clearly without its jurisdiction.*"*

**The Judge Advocate.** There is a diversity of opinion among military writers, as to the *responsibility* of the judge advocate for his opinions given in court. Captain Hughes, in his "Duties of Judge Advocates," states that Captain Simmons has expressed his opinion in opposition to *all other* writers on military law: "that the judge advocate is not responsible to any court of

* Cushing, Opin., April 7th, 1854 (ex parte Dunbar, XIV. Mass. R., 393; Wise *vs.* Withers, 1 Cranch, 330).

justice for the opinion he may give," whatever degree of deference may be due to his advice. The weight of British authority is undoubtedly in favor of his responsibility, and the words of the mutiny act directly applicable to the point in discussion seem also to favor the affirmative. De Hart and O'Brien, the only American authorities, insist upon the negative view of the question. The unreasonableness of holding judge advocates in our service responsible, appointed as they usually are from the junior officers of the army, and frequently without experience and with inferior qualifications for the discharge of such important duties, would seem to border on the ridiculous. His opinions, in the majority of cases, would weigh less than that of any member of the court. This is, however, not a question of expediency, but of law. The law directs the judge advocate to prosecute in the name of the United States. The court is not required to decide points of law and fact according to his advice or opinion. He is a mere *prosecutor*, not a judge; and the members of the court, and *they alone*, are, by their oaths, to *administer justice* according to the provisions of the articles of war, and in case of doubt, according to their consciences, the best of their understandings, and the custom of war in like cases—and not according to the understanding and conscience of the judge advocate. In his military character as an officer, he is responsible to the authority who convenes the court, or revises the proceedings, for the proper discharge of his duty.

The act of Congress approved March 2d, 1849, authorizes the President, by and with the advice and consent of the Senate, to *appoint* a suitable person as *judge*

*advocate for the army*, to be taken from the captains in the army, who shall have the brevet rank, pay and emoluments of a major of cavalry. And the 69th article of war enacts that the judge advocate, or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute, &c. It is by virtue of this article that judge advocates are appointed, to assist at courts-martial, by the officer ordering the court. His appointment can, however, be deputed to an inferior when the convenience and necessities of the service may demand it;—but his presence and assistance are essential to the jurisdiction of a general court-martial.

**The Prisoner.** A court-martial has no control over the *nature of the arrest* of a prisoner, except as regards his personal freedom in court; they cannot, even with a view to facilitate his defence, interfere to cause the limits of a close arrest to be extended. The officer in command is alone responsible for the discharge of this duty, and a case is cited in which the commanding officer was justified in refusing to accede to the suggestion of a court-martial to grant a prisoner such indulgence as might facilitate the examination of witnesses, and thereby enable him to enter earlier on his defence.

It is held by all military writers, as a settled custom, that the prisoner should be furnished with a *copy of the charges* some time anterior to the trial. He ought to have a full knowledge of the accusations preferred against him, and ample time afforded him previous to his arraignment, to decide upon his line of defence, and upon the evidence and arguments that he may deem expedient to meet these accusations. Should the copy

supplied him differ materially from the charges and specifications upon which he is arraigned, justice and reason would seem to demand that additional time be given him by the court, within which to arrange his defence in conformity with the altered state of the accusations. Extreme cases, where the necessity of immediate example is imminent, may justify a departure from this well established custom.

It has been the practice of the service to furnish the prisoner, previous to his trial, with a *list of the witnesses* for the prosecution, though the right to demand such a list is not conceded. The right does not, certainly, rest on law, but as all the witnesses are to be summoned by the judge advocate, who is the prosecutor, and the names of witnesses for the defence will thus become known to him, it is but just and proper that the same privilege be allowed the prisoner by granting him a list of all who are to appear against him. The rule was laid down by high English authority, that it was not the duty of a judge advocate, in *all cases*, to furnish a prisoner, previous to the trial, with the names and designations of the witnesses by whose testimony any act objected against him is to be proved.* And Kennedy does not deem it requisite that the prisoner should be furnished with the names of the witnesses on the part of the prosecution, nor the prosecutor with those on the part of the defence. Still, all other authorities advocate the custom as founded on equity and convenience—as allowing time for the appearance of witnesses after being duly summoned, and affording to both parties equal opportunities of questioning their competency and credibility.

* Sir Charles Morgan.

It must be borne in mind that on British courts-martial, the judge advocate is not the prosecutor,* and may, therefore, hold both lists, without either party being aware of the witnesses required by the other.

The general regulations† leave to the judge advocate some discretion in the *summoning of the witnesses*, as it directs that he shall not summon any witness at the expense of the United States, nor any officer of the army, without the order of the court, unless satisfied that his testimony is material and necessary to the ends of justice. This is a wise provision, as, from the excitement and anxiety incident to his position, the prisoner may, without sufficient reason, deem certain individuals essential to his defence. Should the judge advocate refuse to summon a witness, the prisoner can appeal to the court-martial, from the decision of the judge advocate.

Neither the prosecution nor defence are confined to the list of witnesses furnished prior to the arraignment, nor are they forced to require testimony from all. At any stage of the proceedings, new witnesses can be called, and any, or all of those summoned can be dismissed without examination.

Tytler has assumed the necessity of furnishing the accused with a correct *detail of the members* of the court-martial. As the accused has the right of challenge, it is absolutely necessary to its efficient exercise, that he should have every facility accorded to enable him to show cause, especially as peremptory challenges are prohibited in military courts. To administer justice is the object for which courts-martial are convened, and as every prisoner is supposed to be innocent until proved

* Article 163 British articles of war. † Par. 890.

to be guilty, every privilege, facility, and convenience should be allowed to him consistent with the honest and faithful administration of the laws. Except in extreme cases, therefore, copies of the charges and detail of the court, and a list of witnesses for the prosecution, should be given to the prisoner a reasonable time before his arraignment for trial.

**Amicus Curiæ.** Article VI. amendments to the constitution, declares that "in all criminal prosecutions, the accused shall have the *assistance of counsel* for his defence." And all the writers on military law, without exception, admit it to be the custom to allow a prisoner to have counsel, or at least an *amicus curiæ*, or friend of the court, to assist him in conducting his defence. The assistance is strictly restricted to giving advice, framing questions which are handed by the accused to the judge advocate on separate slips of paper, or offering, in writing, through the same channel, any legal objections that may be rendered necessary by the course of the proceedings. It is an admitted maxim on all courts-martial, that the counsel is not to address the court, or interfere in any manner in the proceedings; his presence is only tolerated as a friend of the prisoner.

Courts-martial have always held and exercised the right of *objecting* to any particular person designated, and to revoke the permission, when granted, in case of any misconduct on the part of the counsel. The exercise of this right is rendered particularly necessary in the trial of soldiers, who often select as friend, from among themselves, who proves to be a most troublesome character, and more likely to prejudice the cause of the prisoner than aid in making a good defence.

If the judge advocate finds it essential to the proper conduct of the trial and the surer furtherance of justice, to request that the accuser, who has been directly affected in his authority or person by the transgression, remain in court, he may, after having given his evidence, be permitted to do so. This is, however, a matter of convenience, and not essential to the proceedings; and the accuser is confined in his assistance to mere suggestions made to the judge advocate, which the latter may follow or not, at his discretion.

**Interpreter.** It is sometimes necessary to employ an interpreter, for the purpose of translating the evidence given by the witnesses. In such a case, he may be introduced and sworn at any period of the proceedings, if required by either party or by the court.

The parties before the court—that is, the judge advocate as prosecutor, and the prisoner—may claim the benefit of *its aggregate opinion*, on any mooted point of law or custom arising out of the proceedings, and in the decision of which both parties may be interested.

**The Record.** The proceedings of a general court-martial are recorded by the judge advocate; and of inferior courts by the junior member or recorder. Not only is the evidence taken down, but every incidental transaction is noted on the face of the record. And courts-martial have the right, which may be exercised at discretion, to forbid any other record to be kept, and thus prevent a daily publication of the proceedings, which might have the baneful tendency to pervert the public mind in regard to the trial and its results, and moreover, have improper influence on the witnesses whose testimony is yet to be delivered.

**Court Assembles.** The order convening a general court-martial having been issued, and the hour for assembling having arrived, the members take their places at the table according to rank, on the right and left of the presiding officer. The president is seated at the head of the table, and the judge advocate immediately opposite to him. The prisoner and his counsel have a table and seats assigned them, with conveniences for writing, on the right hand of the judge advocate, and the witness is seated near the judge advocate, and usually on his left.

## CHAPTER VIII.

## CHALLENGES AND OATHS.

**Challenges.** When a member shall be challenged by a prisoner, he must state his cause of challenge, of which the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court.* *Peremptory challenges*, that is, challenges without cause assigned, are unknown to courts-martial, being prohibited by the above-quoted article.

Challenges to the *array*, are, at once, an exception to the entire court. This might arise either from the want of competent authority in the officer ordering the court, or in its illegal organization, or from the lack of competency and jurisdiction in the court to proceed with the trial, were such challenges permitted by the law. Although the accused may object to every individual composing the court, challenges to more than one member at a time cannot be entertained—he cannot challenge the *court generally;* "until sworn in, it is not competent to decide upon questions in the nature of pleas in bar of trial."†

When a *member is challenged*, the prisoner must state his objections in full. This, together with the assertions or declarations, if any, of the challenged party, and of

* 71st article of war.

† Simmons, p. 193, note.

the witnesses adduced, are committed to writing as part of the record; and with closed doors, the court deliberates and decides on the objections assigned. The challenged member always withdraws on the clearing of the court, in order to promote freedom of discussion. Upon reopening the doors, the parties are called in, and the decision is made known through the judge advocate. The challenged member then resumes his seat, or withdraws altogether and is replaced by a supernumerary, if any be detailed.

The objections of the accused, the assertions of the challenged party, and the declarations of the witnesses, are not made to the court under the solemnity of an oath, because prior to being itself sworn the court has deliberative capacity only, competent to decide on the validity of challenges, while the law requires each member to take a prescribed oath as a necessary qualification for the exercise of judicial authority, and until it is clothed with its judicial power, no oath can be administered by it.

When it *is practicable* to do so, *all challenges should be admitted.* It is not only right to be as mild as possible toward a prisoner, but it is right also to let the public and the prisoner *see* that such is the case. A culprit should never be made to appear in the light of a martyr; for when this takes place, much of the advantage of punishment is lost.* And Sir Edward Blackstone† remarks that upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may provoke resentment. Care should be taken, however, not to admit

* Sir C. J. Napier, p. 94. † 4 Commentary, p. 352.

frivolous causes as valid objections, as otherwise the prisoner might interrupt the course of justice to the injury of the service, it being often inconvenient to replace members who have been thrown out under challenges.

The *judge advocate should*, under particular circumstances, also *exercise the right of challenge*, as there may be members of the court as liable to objections for favorable dispositions toward the prisoner as the contrary. This right is based on the practice of courts-martial, and not on any provision of law, and should therefore be exercised only in extreme cases and with great caution.

The *judge advocate* himself is *not challengeable*, as challenges are by the article confined to the *members* of the court-martial. He is not a member, but an assistant to prosecute in the name of the United States, and to record the proceedings of the court. And yet it has been truly remarked* that if the judge advocate has a bias against the prisoner he has power to gratify it; because by being privy to all the consultations of the court from which the prisoner is excluded, he can, if he choose, bear hard upon the latter. He is also the legal adviser of the court, and this is not fair, even giving the judge advocate credit for being an honorable and able man; if he be a foolish, or a prejudiced, or a dishonest man, who has a spite at the prisoner, the latter has a most dangerous enemy to deal with. Under such circumstances, therefore, there can be no good reason why a challenge of the judge advocate for cause, should not at least be referred, with the grounds assigned, to the authority who convened the court for his orders in

* Sir C. J. Napier, p. 113.

the case. Nevertheless, the practice is, that the judge advocate is not liable to challenge.

*Challenges* to particular jurors have been, by lawyers, *reduced to four heads.* Causes of challenge for the consideration of courts-martial, most frequently fall under the third head—for suspicion of bias, prejudice, or malice, technically termed, *propter affectum*—and may be either a *principal* challenge, or *to the favor.*

**A principal Challenge** is such where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor: as that a juror is kin to either party within the ninth degree; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him; all these are principal causes of challenge, which, if true, cannot be overruled; for jurors must be *omni exceptione majores.*

**Challenges to the Favor** are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance and the like.*

In this connection the following decision from the War Department is quoted, as bearing materially upon this subject.

The accused challenged a member for "bias, prejudice, and malice." The member "then stated that he had no prejudice or bias against the accused which could in the remotest degree interfere with his doing justice in the case;" but "being challenged he requested to be

* 3 Black's Commentary, p. 362.

relieved from sitting on the court," which the court refused, and overruled the challenge. The accused then requested that the member might be "put on his voir dire, in order that he might examine him as to the extent of any prejudice he might entertain;" which application the court refused. * * * "It was never doubted that a juror may be examined as to his bias or prejudice, or his opinions in the matter for trial; except that it was at one time held that opinions formed and expressed, as they may be proved by extrinsic evidence, ought to be so proved.

But that distinction is not now maintained in the courts of the country; and an accused is now allowed in all cases, for the better security of an impartial trial, to show the mind of the juror by examining him before the court; and the only exception is, where the cause of challenge goes to the disgrace or discredit of the juror.

In regard to the sufficiency of the explanation made by the member, the court ought to have considered that it was not a denial, but in some degree an admission of bias and prejudice, qualified by the member's opinion that it could not influence his judgment in the trial. This, however, was the matter of which the court were to judge after inquiring into the nature and grounds of his feelings toward the accused. And as to the proof in this regard the law allows the accused the testimony of the member in the mode he demanded.

The refusal of the court to allow the accused the benefit of the necessary legal evidence to prove his cause of challenge would have set aside the trial, had the verdict been of conviction."*

* G. O. No. 21, July 27th, 1853.

Having *maliciously declared an opinion* unfavorable to the prisoner, is a good cause of challenge. A juryman was set aside on a trial for high treason, because, when looking at the prisoners, he uttered the words "damned rascals."* This would hold as sufficient against a member of a court. The rule extends still further and considers, the *previous expression of an opinion* on the case, as one of the most valid causes of challenge that can be urged. An officer was tried by a court-martial for killing another; the prisoner challenged one of the members for declaring before the trial came on, that he deserved to die; this was proved and admitted by the court to be a just and reasonable exception, and the officer was dismissed, and another sworn in his room.†

It is a good ground of challenge, where a member has been *injured by the accused*, and for which act the latter is brought to trial. A case is cited in which an officer, whose property had been stolen, was by inadvertence placed as a member on the trial. The prisoner was found guilty; but the sentence was remitted because of this circumstance.‡

It is a good cause of challenge, when a member will be *benefited* by the cashiering, dismissal, or loss of rank of the accused, should he be liable to such a sentence in the event of his conviction.

The *officer commanding* the regiment, post, company or detachment to which the accused belongs, may be challenged with cause, on the supposition, that prejudice may exist from previous imperfect or *ex-parte* knowledge of the circumstances inducing the trial, or that

* State Trials, O'Coigly. † Sime's Military Library, vol. IV., p. 64.
‡ Simmons, p. 197.

he had taken an active part in promoting the prosecution or in bringing forward the charge. Although not rendering the sentence invalid, his sitting on the court-martial is an inexpedient proceeding.

It is a valid cause of challenge that a member is a *material witness*, and summoned as such on the trial; but if required to give evidence as to character only, the objection is not admitted. If a member, not having been challenged, shall have taken the oath and his seat, and shall in the course of the trial be examined as a material witness, he is not thereby disqualified from discharging his duty as a member of the court-martial; circumstances may, however, occur, which may render it a subject of regret that the duties of a member and a witness were united, as the cross-examination is often calculated to irritate.* Besides, there is the further objection that he not only hears the testimony of other witnesses, but is actually to decide between the degree of credit to be given to their evidence as compared with his own. In such a case the member should be authorized to withdraw; and this brings up the question, whether challenges can be entertained and admitted *after the members have been sworn?* The ancient severe rule was, as expressed by Adye, that "No juror can be challenged, *without consent*, after he hath been sworn, whether on the same day or on a former; unless it be for some cause that happened since he was sworn." The more humane and reasonable rule now prevails in practice, that there is no reason of justice or of common sense that should preclude a prisoner from challenging, on sufficient cause, any of the members after the court is

* Simmons, p. 198.

sworn; provided he had no opportunity of moving his objection *before* that form was gone through. An objection cannot be said to be waived, which the objector has no power of urging.*

Therefore a challenge to a member for good and sufficient cause discovered after he has been sworn, must be admitted as valid by courts-martial, provided the cause was not known to the prisoner prior to his arraignment.

On an *appeal* from a regimental to a general court-martial, the having been a member of the former, from the decision of which an appeal has been made to the latter, is held to be a sufficient cause of exception.

It is a valid cause of challenge, if the member has been one of a court-martial, in which *the circumstances* about to be investigated have been discussed with direct application to the prisoner about to be tried. The discussion must have been of such a nature as to involve his guilt or innocence, and not merely incidental and without special reference to the accused. It must be tantamount to the expression, or at least formation, of an opinion having a direct bearing on the present trial.

It is also a valid ground of challenge, for a member to *have sat on a court of inquiry* held to investigate the subject of the present accusation, whether an opinion upon its merits had been given or not. Military writers, with few exceptions, uphold this rule, although courts of inquiry in the British service do not elicit evidence under oath, and opinions that may be formed must rest on data of doubtful credibility. By our laws, all testimony before such courts is taken under oath,

* Tytler, p. 231.

and the accused has the privilege of being present, and cross-examining, and of introducing witnesses for his exculpation. With such testimony thus before them, it is impossible that members should not have, unconsciously, formed opinions, even though the opinion of the court, not being required, had not been put upon the record.

Neither should *new members* be permitted, and that fact should be regarded as a valid cause of challenge. Though they may have heard the evidence, and the record may be read to them, and be carefully studied, no reason or argument can controvert the fact that it is at best but a loose and doubtful mode of procedure, not altogether compatible with the strict end of justice for which all courts-martial are assembled. In the military state more than in any other, should every avenue be closed, whence may proceed the slightest misgivings that even in the forms the prisoner may not have received his meed of justice. A soldier's honor should be secured and guarded by all the ways and means that the severest administration of the laws, either as to form or substance, can provide.

**Supernumeraries.** When supernumeraries are detailed for the court, they are liable to challenge, in the same manner and for the same causes as the regular members. This is both right and proper, as the supernumerary member exercises more or less influencein the discussion of questions having a bearing on the trial, and may by the absence of a regular member be called upon to act as such in determining the verdict.

Should a court be *reduced* by challenges, *below the minimum*, an adjournment *sine die*, or for a limited

period, follows, and the facts are reported to the authority that convened the court, who may dissolve the court and order a new detail for the trial of the prisoner. The members who composed the first, may make part of the second court, but they are liable to challenge with the new members.

The *proper time* for challenging a member is immediately after the order convening the court has been read, and before the court is sworn.

## OATHS.

**Defined.** An oath is an affirmation, declaration, or promise, made by calling on God to witness what is said, with an invoking of his vengeance, or a renunciation of his favor, in case of falsehood.* This imprecation of divine vengeance upon perjury is considered essential by the law, and upon it rest the force and sanction of an oath.

**Oath taken.** After the challenges, if any, and before proceeding upon the trial, the following oath must be taken by all the members of a court-martial, whether general, regimental, or garrison:

"You, A. B., do swear, that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America, and the prisoner to be tried, and that you will duly administer justice, according to the provisions of "An Act establishing Rules and Articles for the Government of the Armies of the United States," without partiality, favor, or affection; and if any doubt shall arise, not explained by said articles, according to your conscience, the best of

* Dr. Worcester.

your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."*

The first part of the oath is taken in their capacity as jurors, and binds them to well and truly *try and determine, according to the evidence.* This obligation extends throughout the trial including the verdict; after *trying* the case by applying the most rigid rules to the evidence submitted, they *determine* as to his guilt or innocence according to the evidence admitted. The second part refers to their duties as judges, binding them to *administer justice*, that is, to pass sentence after conviction—the sentence being either prescribed or discretionary. When prescribed, it must be administered according to the rules and articles of war—when discretionary, according to their consciences, the best of their understanding, and the custom of war in like cases, should any doubt arise not explained by said articles. The remainder of the oath contains an obligation to *secrecy* as to the sentence of the court, and as to the vote or opinion of any particular member of the court-martial. No sentence of a court-martial is complete or final until it has been duly approved, and until so acted upon by the proper authority, it is but an opinion which is subject to alteration or revision, and its communication would answer no ends of justice, but might in many cases tend to

* 69th article of war.

frustrate them. With regard to the vote or opinion of any particular member, the obligation to secrecy is likewise founded on the wisest policy. The officers who compose a military tribunal are in a great degree dependent for preferment and indulgence on their superiors, and this might exercise so great an influence on weak minds and depraved hearts, as to lead them from the direct paths of justice, were this not best obviated by the confidence and security that every member possesses.

Another reason of a yet stronger nature is, that the individual members may not be exposed to the resentment of parties and their connections by the sentences awarded. In the course of their duty, it may be necessary daily to associate with persons against whom unfavorable votes and opinions have been given on a court-martial, so that their publicity would create the most dangerous animosities, equally fatal to the peace and security of individuals, and prejudicial to the public service.*

In a general court-martial, the oath is *administered* by the judge advocate; and in the inferior courts by the junior member, who is also recorder and prosecutor, there being no judge advocate allowed them.

As soon as the said oath has been administered to the respective members, the president of the court shall administer to the judge advocate an oath, in the following words:

"You, A. B., do swear, that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence

* Macomb, p. 34.

thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."*

Although the court may continue to be composed of the same individuals, it must be *resworn* at the commencement of each trial, where several prisoners are to be tried by the same court, whether on the same or on different charges.

"All *persons who give evidence* before a court-martial are to be examined *on oath* or affirmation."† Hence is derived the power and authority to administer an oath to every witness; but this does not apply to persons examined, before the court itself is sworn. By the practice of courts-martial, witnesses are sworn by the judge advocate, before the minor courts by the recorder, although the law is silent as to who shall administer the oath—which is as follows:

"You swear, or affirm (as the case may be), the evidence you shall give in the cause now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."‡

Should a witness—being an officer or soldier—*refuse* to be sworn, he may be ordered into arrest or confinement, to answer charges that may be preferred against him for contempt of court, as a breach of good order and military discipline.

**The form of administering** the oath has nothing to do with the oath itself, and yet it should be the object of courts-martial to adopt that ceremony, in every particular case, which most forcibly imposes the obligation

* 69th article of war. † 73d article of war. ‡ Ibid.

of speaking the truth. This can be best effected by swearing witnesses according to the particular mode which they may deem most binding on their consciences.

After he is sworn, the witness may be asked if he considers the oath he has taken binding on his conscience. If he answers affirmatively, his answer is conclusive. The most correct and proper time to ask for the information is prior to his taking the oath.

A witness is *sworn but once* during the same trial, even when called to testify more than once, by either, or both parties;—or by the court for explanation.

## CHAPTER IX.

## FORMATION, ADJOURNMENT, AND DISSOLUTION OF THE COURT.

When a court-martial is once **constituted by competent authority**, it continues in existence until dissolved by the same or superior authority. After having arraigned the prisoner ordered to be tried, it cannot, however, be dissolved without proceeding to judgment, unless it be reduced below the legal number by the death or protracted illness of members. Its dissolution may also be justified by the protracted illness of the prisoner, in which case the prisoner would be exposed to a future trial. Should his death put a stop to the trial, the fact must be established by evidence, and recorded, prior to the final adjournment of the court.

The court must be *adjourned*, at any period of its proceedings prior to the final close of the prosecution and defence, on satisfactory proof of an army surgeon if one is to be had, or of a private physician, that the prisoner is in such a state that his health would be seriously endangered by his attendance in court.

Should illness or other cause prevent a member from attending either before or after the arraignment, the court may adjourn from day to day for a reasonable time, to await his attendance; and should the seats of several members be permanently vacated, and the number pres-

ent not fall below the minimum of five, or the number otherwise prescribed by the order; the court will proceed with the trial. When the legal complement are not present, those in session may adjourn from day to day, but as they cannot constitute a court, neither can they exercise judicial functions in the performance of judicial acts. If a court be reduced below the legal minimum, it may adjourn for a certain period or *sine die*, according to circumstances, and report the facts to the convening authority, who is competent to declare the court dissolved.

**Hours of Session.** No proceedings of trials shall be carried on, excepting between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court-martial, require immediate example.*

The *time and place of assembling* of a court-martial, can only be changed by the authority convening the same, and whenever it becomes necessary or expedient to change the place of meeting, authority must be granted by the appointing power, on proper representations made to him by the court.

**The presiding officer** of a court-martial—besides the duties and privileges of member—is only its organ. He speaks and acts for it in each case, when the particular rule has been prescribed by law, regulation, or its own resolution. He announces the adjournment, when the prescribed hour has arrived. He cannot adopt an hour different from that which has been prescribed, without the approbation of a majority of the court when in session. This right of regulating its own ses-

* 75th article of war.

sions is important and necessary, and the limitation placed on it by the 75th article of war, was obviously intended to secure full and fair deliberation. In this and all deliberations of the court, the equality of the several members was intended to be preserved.*

A court *adjourns* from day to day, and may adjourn for a longer period if demanded by the necessities of the case. When the court adjourns for three days, the judge advocate shall report the fact to the commander of the post or troops, and the members belonging to the command will be liable to duty during the time. When a court adjourns without day, the members will return to their respective posts and duties, unless otherwise ordered.

Courts-martial *deliberate* in secret, and at the request of a member, of the judge advocate, or of his own motion, the presiding officer may direct the court to be cleared for deliberation, or for any incidental discussion. When cleared, no one is present besides the members and the judge advocate. At other times the court is open to the public.

**Votes.** All questions of adjournment, &c., are decided by a majority of votes, and in case of a tie-vote, the question is decided either affirmatively or negatively, according as it has been put.

**Absence.** Should a member of a court-martial, for any cause, absent himself from his seat pending the trial, the question arises, *can he resume it?* It is essentially necessary that the testimony of witnesses should be evolved *in presence* of all the members, as no act can be legal that is performed by a mere part of the court.

* G. O., No. 14, War Department, April 20th, 1850.

Captain Simmons cites a case,* in which a member was permitted to resume his seat after being absent one day. The reviewing officer said: "This proceeding is so directly at variance with the practice of courts-martial and the principles of justice, that it may be held to affect the legality of the judgment of the court," and concludes his remarks by stating that "the irregularity, before observed, has *rendered nugatory* the *sentence* of the court-martial." The occasional withdrawal of a member for a time, however limited, must suspend the examination of a witness; whatever is in itself unjust and irregular should not be tolerated even in the slightest degree. It is for this reason that supernumeraries are required to be present throughout the sessions of the court, that they may be properly qualified to fill a vacated seat at any moment during the trial.

There is no doubt that in justice the absent member should not resume his seat. But who is to decide the matter, and has the court the power to exclude the member? The opinion of Mr. Attorney-General Cushing, in a case that occurred in the navy, throws light upon the subject. He says, It is true that, not having heard a portion of the witnesses testify, so as to judge of their credibility from their appearance and manner of testifying, he was without some of the means of proper judgment. Suppose he had been absent during a protracted and complicated trial, and came in on the last day to hear the arguments, not having heard the testimony at all, could he properly have a voice in the finding? This could hardly be. But the length of absence determines nothing.

* Page 208.

However this may be, whether the absent member shall act or not upon his return, must depend on his own views of propriety, and not upon those of the court, which is nowhere clothed with power to expel a fellow member. When the court is organized, the questions before them relate to the accused, and not to the qualifications of their brother members, of which they have no jurisdiction. I think they had no authority to exclude him from a seat in the court.

This view of the powers of a court-martial is contrary to the universal practice in such cases. True, the articles of war only authorize courts to determine the relevancy and validity of *challenges*, and to decide thereon, but this takes place during its organization, and before they, by their oath, assume their judicial powers, and by no article of war is the power conferred on the court to punish its own members. It is unusual, in the practice of all courts of justice, for judges who have not heard the whole trial, to participate in giving judgment; but there is no law to prohibit them from doing so, or to compel them if they refuse. Courts-martial then decide on such cases by authority of custom of service, and not by powers granted by statute, and as such custom is not prohibited by law, and has received the sanction of time, practice and military writers, and as its continuance contributes largely to the exhibition of fairness in the administration of justice, the present practice should remain undisturbed.*

The *absence of the judge advocate*, at any time during the progress of the trial, does not invalidate the proceedings, and he may resume his duties at any moment.

* Opinions, April 11th, 1855.

Application for **delay or postponement of trial** must, when practicable, be made to the authority convening the court. When made to the court, it must be before plea, and will then, if in the opinion of the court well founded, be referred to the authority convening the court, to decide whether the court should be adjourned or dissolved, and the charges reserved for another court.*

Upon application by the accused for postponement on the ground of the absence of a witness, it ought distinctly to appear on his oath, 1st, that the witness is material, and how; 2d, that the accused has used due diligence to procure his attendance; and 3d, that he has reasonable ground to believe, and does believe, that he will be able to procure such attendance within a reasonable time stated.† When such an application is made on the part of the prosecution, courts-martial are less ready to grant it than when requested by the accused, because, as the government can fix its own time for holding the trial, there is no excuse for want of preparation in any particular. The postponement or suspension of proceedings in either case, cannot be demanded as a right, and the court may in its discretion grant or refuse the application.

* Revised G. R., p. 124. † Ibid., p. 125.

## CHAPTER X.

## OF THE TRIAL AND ITS INCIDENTS.

In those numerous incidents of their constitution and mode of action, concerning which the statute rules are silent, courts-martial are to be governed by the general principles of military law, recurring to adjudged cases, precedents ruled, authoritative legal opinions, and approved books of legal exposition.*

**Detail.** The trial of an officer or soldier against whom charges have been preferred, having been considered necessary, a warrant issues from the proper authority for the assembling of a court-martial. The warrant details the members and judge advocate who are to compose it, as well as the time and place of meeting. In the detail the members will be named, and they will take place in the court, in the order of their rank. A decision of the proper authority in regard to the rank of the members cannot be reversed by the court.

The court having *assembled*, the names of the members are called over by the judge advocate, and they take their seats according to rank.

The court is then proclaimed open, and the parties in the cause are introduced.

In those cases where the court may desire to *forbid the publication* of the proceedings, the president gives

* Attorney-general's opinions, January 31st, 1857.

notice to that effect; and a military man might be tried for disobedience of orders, should he publish any portion of the same after such prohibition.

**Order Read, &c.** The order convening the court is now read by the judge advocate, and if the latter be appointed by a special warrant, or if subsequent orders have changed the original detail, they will likewise be read, in an audible voice, within hearing of the prisoner. The judge advocate then asks the prisoner whether he objects to be tried by any of the members present named in the order, and if so to present his cause of challenge. Peremptory challenges not being permitted, the accused must state his reasons in writing, or they may be recorded, as stated, by the judge advocate. Where two or more members are challenged, they must be objected to in the order of their rank, commencing with the senior, one member being challenged at a time, and each individual case settled by the court before entering upon another. In all cases where the vote is equally divided, the decision is given in favor of the party challenging.

**Charges.** When all the objections have been acted upon, and there remains a legal number of members competent to proceed with the trial, the charges and specifications preferred against the prisoner are read for the information of the court. This, though not the practice of courts-martial, is deemed essential, as it formally brings before the court the *matter*, touching which they are about to swear that they will *well and truly try and determine.*

The officer who appoints the court finds the "true bill" of indictment, but the judge advocate, as prosecu-

tor for the United States, has *official right to make the charges technically correct.* When, however, in the judge advocate's opinion the facts specified constitute one offence, and in the opinion of the convening authority they constitute another, it becomes a question as to whose opinion shall govern.

"In recent orders from the head-quarters of a department, the arraignment and consequent trial of certain named soldiers, before a general court-martial, ordered 'for the trial of such persons as may be properly brought before it,' is pronounced *illegal*, as 'not having been authorized by the department commander' — the charges not having been forwarded from department head-quarters, but preferred on the spot.

"It is not deemed safe, or consistent with the interests of military discipline, to allow this ruling to pass, unquestioned, into a precedent.

"The orders were in the usual form, nor limited by any accompanying instructions. Under such orders, it has been the long-standing and general practice of the service, for a court-martial, in its discretion, to try offenders against whom charges are presented, through the judge advocate, by the highest authority on the spot. The custom seems as reasonable as convenient, and can only be questioned by a negative inference from the silence of the law. It invades no rights, but protects the right of speedy trial. It saves expense, empties the guard-house and makes punishment effective by promptness.

"Should the authority instituting a court-martial disregard these considerations, and limit the court to the trial of certain named cases or of a certain class of cases,

a specific form of order should then be used to express its intentions."*

**Additional Charges.** The convening authority is not only competent to alter and amend the original charges, at any time, antecedent to the arraignment, but also to prefer additional charges and specifications against the prisoner. The latter has the right to due notice of the additional charges, as well as to any material alterations in the original ones, before being called to plead. Subsequent to the arraignment, no additional charges can be entertained, either referring to the points in issue or to a distinct offence. This is based upon the practice of courts-martial, and on the very words of the oath taken by each member: "You will well and truly try and determine, according to evidence, the matter *now* before you." For any offence committed either prior or subsequent to his arraignment, unconnected with the subject matter in issue, the prisoner is certainly amenable; but the offence must form the subject of a separate charge and specification, and the trial be distinct—tried by the same, or by another court-martial. The following bears directly upon this subject.

"The action of the court in declining to try the additional charges against (the prisoner), on the ground that he had already been tried by the court, and that all the means of punishment at its disposal had been exhausted in the sentence passed at that trial, is not approved. The accused was amenable to trial—subject to the legal limitation—while he remained in the service, and he was entitled to it as speedily as possible. The court could not know, in anticipation of the orders of the

* G. O. No. 7, Head-Quarters of the army, May 20th, 1857.

reviewing authority, that the first trial would not result in the prisoner's continuance in service; neither could it assume that the trial of the additional charges would not result in an acquittal."*

**Court Sworn.** The accused being in attendance, the judge advocate proceeds to administer the oath as prescribed by the 69th article of war; after which the president swears the judge advocate.

*The record must show* that the court was organized as the law requires; that the court and judge advocate *were duly sworn* in the presence of the prisoner; that he was previously asked whether he had any objection to any member, and his answer thereto. A copy of the order appointing the court, will be entered on the record in each case.

It was declared in the case of Peter Clark, a seaman in the navy, that the proceedings were "irregular and void," because it did not appear on the record that the judge advocate had been sworn agreeably to the law. "The maxim well applies, that that which does not appear should be considered as not existing; and when it is considered that he is to keep the record of the evidence given, and the proceedings of the court; and that upon this evidence and proceedings as recorded by him, the fate of the accused is ultimately to be decided, every reflecting mind would concur in saying that the fidelity of this officer should be secured by the usual sanctions."†

It was also decided in the case of Midshipman Guthrie, that the justice and propriety of administering the oath

* O. No. 20, Head-Quarters Department of Texas, June 5th, 1855.

† Attorney-general's opinions, Dec. 24th, 1838.

to the judge advocate, are not less apparent than its necessity in point of law.*

And again; by the 69th article, it is required that the members of the court shall take an oath "well and truly to try and determine, according to evidence, the matter now before you, between the United States of America, and the *prisoner to be tried*." On this point the record is silent; it does not show that the members composing the court, acted under the *obligations* of an oath, as the law requires shall be the case. It is not presumable that so essential a circumstance was overlooked by the court; but be this as it may, it is a matter not open to explanation and proof. The law requiring that the court shall act upon oath, that it was so done must be rendered manifest by the record itself, and can be made apparent in no other way. In this view, then, the proceedings are defective; so much so, that a judgment cannot be pronounced upon them.†

In *regimental and garrison* courts-martial, there being no judge advocate appointed, the junior member, who is also recorder, administers to the members, himself included, the same oath that is prescribed for the members of a general court-martial; and as this oath enforces secrecy, the recorder does not take the particular oath prescribed for the judge advocate.

Whenever the same court-martial *tries more prisoners than one*, and they are arraigned on separate and distinct charges, the court is to be sworn at the commencement of each trial, and the proceedings in each case will be made up separately.

* Opinions, June 9th, 1840.

† War Department, Sept. 29th, 1829.

If the prisoner or judge advocate desire a *postponement* of the trial, the application must now be made. It is essential that courts-martial should have a thorough knowledge of the matter to be investigated, and have assumed the judicial character by being sworn, before deciding on the necessity of delaying proceedings. Circumstances may arise during the progress of the trial, when a temporary adjournment, even to the extent of several days, might materially further the proper development of the case, still, if practicable, all applications should be made prior to the arraignment.

**Counsel.** At this stage of the proceedings, though it may be permitted at any time, the accused makes his request for the privilege of introducing his counsel.

**Arraignment.** The charges and specifications are now read to the prisoner, in open court, by the judge advocate, who arraigns him in the following terms: "Captain A. B., — regiment of ——, you have heard the charges and specifications preferred against you; how say you—guilty or not guilty?" The pleas are made to the specifications to each charge in their order, and then to each charge.

**Pleas.** The ordinary plea is, not guilty, but the accused may plead in bar of trial, or plead guilty, or stand mute.

**Standing Mute.** When a prisoner, arraigned before a general court-martial, shall, from obstinacy and deliberate design, stand mute, or answer foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had regularly pleaded not guilty.*

In all cases where the prisoner does stand mute, it is

* 70th article of war.

the duty of the court to determine, before proceeding to trial, whether this is not the result of obstinacy or deliberate design. The court may find that the prisoner is insane, in which case no further proceedings can be had, and the court must assign the insanity as a reason for not continuing the trial. And if, at any time during the trial, it appears that the prisoner is insane, all further proceedings must cease for the same reason. If the prisoner is found *mute by the visitation of God*, the court will proceed with the trial only when the prisoner is of competent intelligence, and can be made to understand the proceedings and evidence, and can also communicate, by means of writing or conventional signs. Still it is a point yet undetermined, whether judgment of death can be given against one who hath never pleaded, and who can say nothing in arrest of judgment.*

**Pleading Guilty.** If the prisoner pleads "guilty" in open court, no evidence can be taken on the part of the prosecution, because no issue is made. Every thing alleged is admitted, and evidence is only needed for deciding a matter in dispute. Such a plea, however, neither precludes on the part of the accused the production of evidence as to fact and character, nor is it a bar to his making a written defence in extenuation of his offence, or in mitigation of punishment. The object of his plea may be to confine the notice of the court to the alleged crime as it stands on the face of the charge, and he has a right to any benefit flowing therefrom. Having pleaded guilty, the accusation may be considered as virtually proved and the prosecution closed, as by the constitution, a confession in open court—for treason, the most

* 4 Blackstone, p. 524.

flagrant political crime—is held to be equivalent to the testimony of two witnesses. The practice of our courts now is, to warn the accused of the consequences of such a plea, and to admit all evidence on his part in mitigation or explanation of his conduct, whether as to fact or character. The right of cross-examination, of course, exists on the part of the prosecution.

Where the prisoner pleads *guilty to the specifications*, but not guilty to the charge, no evidence is admitted to prove the allegations contained in the specification, because they are not denied. The prosecution may, by argument, attempt to show that the allegations admitted by the prisoner do prove the crime charged.* As in the case of pleading guilty to the whole accusation, the accused may introduce evidence to excuse or palliate his conduct. The accused may also plead guilty to certain portions of a specification, and not guilty to the remainder of it.

**Pleas in Bar of Trial.** These may be, either to the jurisdiction of the court, or what are termed special pleas.

**To the Jurisdiction.** A prisoner pleading to the jurisdiction of the court, may allege that he is no soldier, or not amenable to a court-martial; or that he, being a soldier, is arraigned before a court-martial for a civil crime; or brought for trial before an inferior court, for a crime made cognizable by a general court-martial under the articles of war; or arraigned before a court not legally constituted either as to the authority which convened it, or as to the number of its members; and for these causes may take exception to the jurisdiction of the

* O'Brien, p. 251.

court-martial. When these or like causes exist to make the jurisdiction doubtful, the accused should plead accordingly.

**Special Pleas.** A special plea in bar of trial, presents to the court a reason why the accused should not be called on to answer to the charge, nor be tried for the offence alleged.

**1st. A former acquittal, or a former conviction** before any court-martial of competent jurisdiction. These are made valid pleas in bar, and are authorized by the last clause of the 87th article of war, which enacts that no officer, &c., "shall be tried a second time for the same offence," and by article V., Amendments to the Constitution, which provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."

The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England—that no man is to be brought into jeopardy of his life more than once for the same offence. The plea of *autrefois convict*, or a former conviction, *for the same identical crime*, though no judgment was ever given or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. Yet in many instances, where, contrary to evidence, *the jury have found the prisoner guilty*, their verdict hath been mercifully set aside, and a new trial granted, &c. But there hath been, yet, no instance of granting a new trial, *where the prisoner was acquitted on the first.**

From this it follows, that former acquittals and convictions are valid pleas in bar of trial, and that a second

* Blackstone, 4, p. 336.

trial on charges upon which he has been previously convicted, can only be ordered and held for the benefit of the prisoner and upon his own motion. The law was devised purely for his benefit, and can never by any possibility operate against him. It must also be considered that the plea is his privilege, to be exercised or not at his own pleasure, and if the accused makes no use of it, the court cannot take cognizance of it in order to bar the trial. The plea of the prisoner alone can put the previous trial in issue, otherwise the action of the court cannot be judicially directed to it.

The question arises, *what constitutes a former acquittal or former conviction?* Formerly it was considered to be nothing more or less, than the trial and conviction or acquittal of an officer, non-commissioned officer, soldier, or follower of the army, by a legally constituted court-martial of competent jurisdiction, with the "confirmation" of the reviewing authority.*

Recent decisions seem to have somewhat modified, on principle, the old laws of the books, or text writers on *autrefois convict* and *autrefois acquit.* At one time verdict upon good indictment was required. At the present day verdict is not necessary. It is *sufficient, if the accused has been put on trial on a valid indictment; if he has pleaded and been given in charge to the jury; and if there be no valid, legal objection to proceeding to judgment.* If mere "disapproval" by the reviewing authority could annihilate the trial, or, after the prosecution had begun, new trials could be ordered indefinitely, the fate of the accused would remain unprotected in the hands of an unscrupulous superior, who, by packing a

* Opinions, Sept. 14th, 1818, and G. O. No. 2, War Dept., Jan. 13th, 1844.

court to do his bidding, might bring to undeserved punishment the most innocent of his inferiors.

In Captain Van Bokkelin's case, the court found him guilty of the 1st and 2d *charges*, and sentenced him to be cashiered; these charges being sustained by the plea of the accused, and by the evidence of the prosecution. But it appearing that the court had rejected legal evidence offered by the defence, in refusing to allow the witness to be sworn upon evidence which did not go to his competency at all, and which, even as going to his credibility, was not in legal form, the secretary of war decided that the accused was entitled to a new trial for the benefit of the evidence ruled out, should he claim it. "He will therefore be allowed to say whether he abides the verdict and sentence on the 1st and 2d charges, or claims a new trial on them." The accused demanded a new trial on them, which was granted, and the court found him guilty of both charges, and sentenced him to be cashiered; which sentence was confirmed by the President of the United States.*

A *new trial* cannot, then, be ordered, *unless for the benefit of the accused and upon his own motion;* and, as a general rule, *the mere arraignment and pleading* upon the same charges before a court-martial, is a *valid plea in bar* of another trial for the same offence.

A *distinction* must here be made, however, between the illegal act of a legal court, and the act of an illegal court. In the former case, the accused cannot be again put upon his trial for the same offence; in the latter he can, because the act of an illegal court is void, being the act of no court at all.

* G. O. No. 18, War Department, May 8th, 1861.

A mere *arrest* of an officer and his discharge without trial, is not a valid plea in bar. In the case of Lieutenant Gassaway, who was tried in July, 1819, he pleaded in bar, a former *arrest* on the same charges and a discharge *without* trial. His plea was not well founded, as appears by the opinion of Mr. Attorney-General Wirt, who states that the fifth amendment to the constitution provides that no person shall be subject for the same offence, to be twice put in jeopardy for life or limb. But a mere arrest, even in cases punishable in life or limb, is not considered as constituting this jeopardy. The principle is derived to us immediately from the common law. It is a maxim of this law, that a man shall not be brought into danger of his life more than once for the same offence; but to give the benefit of this maxim, it is necessary that he should have been actually *acquitted* or *convicted on a former trial*, and the record of this fact must be produced.*

§ A *former acquittal or conviction* of an act, *by a civil court*, is not a good plea in bar before a court-martial on charges and specifications covering the same act. The whole ground is covered by the incidents of the trial of Captain Howe. He was charged with "conduct prejudicial to good order and military discipline," in cruelly beating, kicking, and maltreating a private soldier belonging to his command, on the 6th December, 1839, and with this aggravation, "all of which cruelty did cause the death of said private, James Jones, of troop G, 2d dragoons."

The court-martial convened in April, 1840. The second special plea in bar of trial, presented by the

* Opinions, vol. I., p. 294.

accused, was to the effect that the charges against him were not proper to be tried by a court-martial, but only by a civil court, and that the offence, if committed at all, was committed within the county of St. John's, E. F., and that the superior court of the eastern district of Florida had jurisdiction in said offence. The court sustained this second plea, and decided that they could not take cognizance of the offence for the trial of which the court was convened. The commanding general disapproved this decision, inasmuch as the unmilitary conduct charged ought to have been tried by the court-martial, leaving the homicide to be tried by the civil tribunal. Out of respect to the civil authority, the commanding general deemed it proper to suspend all proceedings in the case, until the decision of the civil court should be made known. Captain H. would, notwithstanding, be subject to trial before a court-martial for any breach the military law.*

On the 20th October, 1841, Captain H. was tried before the court of Florida, upon the indictment for manslaughter which had been found against him, and was, by the verdict of the petit jury and the judgment of the court, thereof acquitted.

The court-martial having been suspended in its proceedings, and the impediment to the further military prosecution—the officer being in custody of the civil authorities at the time—having been removed, the court was ordered to reassemble, and met on May 10th, 1842. The accused now pleaded in bar, his arraignment, trial and acquittal, on the before-mentioned indictment for manslaughter, showing an authenticated transcript of

* G. O. No. 25, Head-Quarters of the army, May 22d, 1840.

the record of the trial and acquittal, in the court of Florida. The court-martial would *not admit the validity of such plea*, and proceeded to trial. The accused was found guilty, and sentenced to be suspended from rank, pay and emoluments for twelve calendar months. The proceedings, finding and sentence were duly approved and carried into execution.

In his comments, the attorney-general says: "Assault and battery, and homicide, are violations of the municipal laws of the place where committed, to be tried and punished by the proper tribunal of the state or territory whose peace is broken and laws offended." But the same acts being done by an officer or soldier of the army of the United States, over and above the breach of the local law, is a breach also of the law of the United States, a violation of the rules and articles for the government of the armies of the United States. In such a case, the offender is punishable both as a citizen, subject to the municipal law of the place, and also as a soldier, or officer, subject to the military law of the United States.

Such *double accountability* to two different jurisdictions and to different and double punishments, for the same act, making two different offences, is settled to be lawful by the decisions of the Supreme Court of the United States, in the case of Moore *vs.* the state of Illinois. That is to say, the rule of the military law which decides that an officer or soldier, though tried, on the act of killing his superior officer, for murder by the civil magistrate, is not the less triable afterward for mutiny by the military law, is in complete accordance with established rules of common civil jurisprudence. This

case disposes of the question of *autrefois acquit*, or of *autrefois convict* at common law, or of double jeopardy of life and limb, for the same offence, in the amendments of the constitution; for the courts say unequivocally, that when an act offends against two jurisdictions, and has distinct criminal relations by each, "either or both" of the jurisdictions may punish the act, it being the case of punishment of two offences, not of two punishments for one offence.*

Analogous to the plea of autrefois convict, is the fact of having been *previously punished* for the same offence. Such a plea in our service must be considered, at best, of doubtful validity, as no superior in the army is empowered to punish an inferior without due process of law; and the assumption and exercise of such authority over an inferior could do no more than influence the court toward the infliction of a lenient sentence, in the event of conviction. Were a commanding officer empowered by law to inflict certain kind and degree of punishment for certain specified offences, the exercise of this power would constitute a valid plea, unless fresh circumstances, previously unknown, rendered the punishment inflicted not at all commensurate with the increased gravity of the offence.

2d. **A pardon** may be pleaded in bar of trial; if full, it at once destroys the end and purpose of the charge, by remitting that punishment which the prosecution is calculated to inflict.†

After the termination of the Mexican war, the President directed it to be announced "that deserters from the army, at large, may peaceably return to their homes

* Cushing, April 7th, 1854. † Blackstone, 337.

without being subject to punishment or trial on account of such desertion.*

A case is cited by Simmons,† in which the court were of opinion that the forgiveness of the prisoner, by his commanding officer, of this same crime of desertion now preferred against him, and the prisoner having been ordered to duty subsequent to such forgiveness, did amount to a pardon; which opinion was confirmed by the field-marshal.

3d. The prisoner may plead in bar, the **statute of limitation**, prescribed by the 88th article of war in these words: "No person shall be liable to be tried and punished by a general court-martial for any offence which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period." When this plea is preferred by the accused, it is decisive, unless the prosecution can show that the prisoner was not amenable to justice within the time limited, by reason of absence or other manifest impediment.

In the case of Captain Howe, a plea of this kind was made, which was overruled by the court. The facts were these: a general court-martial was ordered on the 10th of April, 1840, within seven months after the offence had been committed, to try the charges, &c.; and the accused pleaded in bar certain proceedings against him, for the same act, pending before a civil court, thus himself showing to the court-martial the impediment that existed. The action and proceedings of the court-

* G. O. No. 35, War Department, July 6th, 1848. † Page 217.

martial were suspended because of that impediment, which was not removed until the 20th of October, 1841. On the 2d of March, 1842, the trial of Captain Howe was ordered to be proceeded with, by the reassembling of the court-martial on the 10th of May, then next, which was done accordingly.

The prosecution was therefore ordered in four months and four days after the impediment was removed, making less than eleven months of delay in prosecuting the offence; and the court therefore decided that the prosecution was within the exception and saving of the statute, which decision was affirmed by the commanding general.

The attorney-general states that the suspension of the proceedings, because of the pending indictment before the court of Florida, and the respect so paid to the civil magistrate and civil proceedings, were justified by the 33d article of war, as also by precedents, sound reason, and a just principle, that the military authority should respect and await an instituted proceeding of the civil authority, in cases where they have concurrent jurisdiction over persons who have offended against both the municipal law and the military law.

So long as the civil magistrate holds the party in actual physical custody, he holds him rightfully; and the military authorities are bound to aid him in this respect. But if the party escape from the sheriff, or if he be released on bail, or if he be tried and acquitted, or if he be tried and convicted, in each of these cases, so soon as he leaves the manual custody of the civil magistrate, he reverts to the authority of his military superior. In all the predicaments of life, he continues to be *sub vexillo*. The *sacramentum militare* clings to him indissolubly,

until he is discharged by death, or by the lawful act of the President.

Where the accused *makes his plea but waives it*, and insists on his trial, the court-martial cannot enter upon it. In reference to this point, the attorney-general observes: "That the prompt prosecution of offences was considered as essential to the general discipline and moral purity of armies; that the design of the rule was to discourage that ill-judged lenity which is so well calculated to destroy the efficiency of an army, &c. The rule, therefore, being bottomed on these grounds of public policy, I don't think that it is competent to an individual to waive it; or that a court-martial can proceed, even at the application of the arrested party, to examine into offences of more than two years' standing previous to the order summoning the court, unless the prosecutor can show that the party accused, by reason of absence or other manifest impediment, had not been amenable to justice within the time limited by the article."*

4th. The accused may also plead a total or partial **want of specification** to the charge as to matter, or as to time, where time is an essential ingredient of the offence, or necessary to fix the identity. This plea can be made on the ground that the specification was entirely wanting, or that, being couched in such vague terms and not pointing to any specific crime, it did not admit of a particular defence; and that, moreover, it could not permit the plea of this previous trial in bar of another prosecution for the same identical offence. If admitted, the plea would not bar a trial upon charges where the facts

* Wirt, July 25th, 1820

were specifically set forth, and for this reason such objections are usually reserved until the defence, or are made the subject of remark subsequent to pleading, since the course of the prosecution would elicit the facts that were intended to cover the charge, and the finding of the court would save the accused from a second trial for the same offence.

Where the court has entered on the investigation, the *total want of specification* may be urged as good and sufficient reason for declining all defence, and would render the proceedings of none effect, as under the circumstances no sentence could be enforced. Simmons cites a case, where the accused pleaded "Not guilty. I do not know what crime I am tried for," to the charge of "disgraceful conduct, he having been repeatedly guilty of offences by which he is deemed unworthy to remain in his majesty's service." The court, however, found him guilty, and recommended him to be discharged, &c. The decision of the judge advocate general was, that the charge was so absolutely defective in all legal respects, that it was impossible to confirm a finding of guilt thereon; and that he considered any revision of the sentence out of the question, as no sentence of punishment could be properly adjudged or enforced upon a charge not supportable by law.

5th. The prisoner may make a plea **in abatement,** which is usually a misnomer, or false addition. The court is competent to permit the flaw or error to be corrected, upon the representation of the accused; "for it is a rule upon all pleas of abatement, that he who takes advantage of a flaw must, at the same time, show how it may be amended."* In case of a misnomer, the pris-

* 4 Blackstone's Com., 334.

oner is bound to give his real name, and the charges as corrected, or new charges made according to his averments, may be tried by the court. The effect of this plea is, to delay the proceedings.

The same may be said of a plea made because *no copy of charges* was furnished the prisoner, or that there is a material variance between the copy furnished him and that upon which he is arraigned. In either case the proceedings will be delayed, to allow proper time for the prisoner to prepare to meet and defend himself from the accusations.

**Form.** In making these pleas there is no special form required by courts-martial. The prisoner states his plea in writing, or his verbal statement is taken down by the judge advocate. In all cases, when necessary, the prisoner is of right permitted to call up evidence to substantiate his objections, and is also at liberty to address the court. The prosecution may bring in rebutting evidence, and is entitled to a reply. All this goes upon the record.

Where the plea is *not admitted* by the court, the prisoner has still the privilege of pleading to the general issue, guilty or not guilty. Should he adhere to the unadmitted plea, and refuse to plead guilty or not guilty, the court will proceed as if he had stood mute, or pleaded not guilty.

**Not Guilty.** The most usual plea offered is, "Not guilty," upon which the trial proceeds. *The pleas are always recorded.*

**Witnesses.** The judge advocate now calls in his first witness, and, if necessary, clears the court-room of all persons who may have been summoned, as it is a general

rule to exclude all such on both sides, during the examination of any witness.

Previous to the introduction of the first witness, the judge advocate may open the case by such a *statement* of its merits and view of the evidence as he may deem expedient, restricted, however, to language perfectly respectful to the court, not foreign to the charges, and not reproachful to the accused. This method of opening the trial is almost unknown in the practice of our courts-martial, and should only be resorted to when the intricacy of the case demands a prefatory statement that will cause the testimony to be better appreciated and more easily applicable. This statement must appear, in full, upon the record.

When the judge advocate intends to request the *assistance* of the person who has preferred the accusation, the latter, if also a witness, should be the first examined, and his examination should be so complete as to preclude the necessity of calling him to testify again after he has heard the testimony of other witnesses. Cases may occur where, after having heard some or all of the evidence, a person may be called as a witness. This fact does not render him incompetent, though it may affect his credibility.

*Competency.* When a witness is produced, any objection to his competency ought to be stated before he takes the oath.

The witness is *sworn* by the judge advocate, and his name, rank, regiment, or corps, or distinctive condition, is recorded at length, so that he may be readily identified by the description.

The *examination of witnesses* is invariably in the

presence of each member of the court, because the countenance, looks, and gestures of a witness add to, or detract from the weight of his testimony. The witnesses are sometimes directed to give a narrative of what they know in relation to the matter under investigation, as affording in many cases the most natural method of detailing the circumstances and facts in the order of time, thus presenting a clear and consistent statement. The usual and preferable mode of conducting the examination, however, is by interrogation—by question and answer—as being the more certain, direct, and searching means of eliciting evidence.

All *evidence* whatever should be *recorded* on the proceedings, in the order in which it is received by the court, and, if possible, in the very words of the witness. Should the judge advocate use his own language, he constitutes himself the judge of the shade of meaning intended, and may not convey the proper idea to the minds of the members, or to the reviewing authority. It is best, therefore, to record the very words and peculiarity of expression, for the benefit of those who are to decide on the evidence. If there be any doubt as to the idea intended, the necessary explanation must be elicited from the witness himself.

A witness may refresh his memory by referring to a *memorandum* of facts that he may have made, but this does not permit his reading a written statement of the testimony he is to give. The opposite party, when cross-examining, must be allowed to inspect the memorandum used by the witness.

Where the *witness is too ill* to attend the court, the latter may adjourn to the room of the former to receive

his evidence, but the *whole court* must attend for that purpose. This, of course, would only be done where the witness was at a convenient distance, as at the same post where the court is convened.

**Deposition.** On the trial of cases not capital, before courts-martial, the *deposition* of witnesses not in the line or staff of the army, may be taken before some justice of the peace, and used in evidence; provided the prosecutor and person accused are present at the taking of the same, or are duly notified thereof.*

The 74th article of war by providing, under certain restrictions and in cases not capital, that depositions may be taken, negatives their allowance in other cases; and the existence of the provision sufficiently proves that without it, such testimony would not be competent, even in those minor cases.†

**Compulsory Attendance.** Officers and soldiers, and other persons connected with the army may be compelled to appear before a court-martial; and the above-quoted article supplies to some extent the deficiency of law in this regard with respect to non-military persons, by providing that their testimony may be taken by deposition. Why compulsory process is not permitted in the case of civilians, arises very naturally from the excessive jealousy of the military state that has always existed in free governments, and the repugnance of a free people to be brought under military control even in the cause of justice and right. It is indirectly but another proof of the entire subordination of the military to the civil power.

The custom has obtained of *reading the charges* and

* 74th article of war. † Attorney-general's opinions, June 30th, 1830.

specifications, or portions of them, to a witness as soon as he is sworn, and prior to his examination. This is most objectionable as a rule, and is in direct variance with the practice of civil tribunals, which, by analogy, are our safest guides in the absence of law or regulation. Whenever the reading of the specification may operate as a leading question to the witness, either as to time, place, or particular words and expressions, it should of necessity be omitted; and as it is difficult to draw the distinction between cases in which this method should be observed or omitted, the rule should be fixed that all examinations of witnesses be by interrogation, and that the specifications be read to him and he put on a narrative, only in clear and unobjectionable cases, and as rare exceptions to the general rule.

All *questions to a witness* are reduced to writing by the individual originating them, whether he be the judge advocate, the accused, or a member of the court. The question is read aloud and entered upon the record by the judge advocate, and if no objection be made to it by the opposite party or by the court, it is addressed to the witness. Either party and any member of the court may object to the putting of any question that is proposed, and whenever objection is made, the court is cleared and a majority of votes determines whether or not it shall be put. If the question is rejected it shall not be expunged from the record, except by permission of the court and with the consent of both parties, but shall appear in the proceedings with the decision of the court thereon.

In all cases the court must have the statements for and against the propounding of a question, recorded for

the information of the reviewing authority; but the court may decline receiving any protest against any of its decisions. When the judge advocate considers a question as too objectionable to be read in the hearing of the witness, his duty is, to ask the court to be cleared before reading it, and have their decision upon it, as witnesses may be instructed by improper questions, even when not admitted.

*A question put by the court* cannot be objected to by either party, as the court is the sole judge of what evidence is to be admitted or rejected; and neither party can insist on a question being put, that has been rejected—the decision of the court being final. A question put by an individual member, if accepted, is recorded as *by the court;* if rejected, as *by a member.*

The witness being sworn, the party who produces him, proceeds with the examination which is called the *examination in chief;* the opposite party then examines him in what is styled the *cross examination;* the party that introduced the witness can question him upon such points as the opposite party may have touched upon,—this is called the *re-examination.* It is customary and best for the court to defer questioning the witness until after his entire examination by both parties has been concluded, although the court is competent to question at any time. It is essential to the regularity of the proceedings of a court-martial, that this mode of examining witnesses be strictly adhered to, as indiscriminate questioning is apt to confuse the witness and perplex the case.

Pending his examination, the witness has a right to *explain the evidence* he has given, but entries already made in the proceedings are not, as a consequence, to

be erased or expunged; and the court may call upon him to explain any doubt that may arise after his examination has closed. When deemed necessary by the court or desired by a witness, the record of his evidence when completed *is read over to him* immediately before he leaves the court, and he is desired to correct it if erroneous, and any remark or explanation is entered on the proceedings; but the testimony should not be read to him, or he be permitted to refer to it, when under or previous to cross-examination, as such a course might defeat the very ends and purposes of a cross-examination. No erasure or obliteration is permitted under any circumstances, as it is absolutely necessary that the reviewing authority should have the most ample means of judging, both of discrepancies in the testimony of witnesses and of incidents that have been made the subject of comment by either party. Immaterial questions, or such as have been put inadvertently and answered, might be *expunged*, the parties not objecting, but it is not advisable to follow such precedents. It is best to make a minute of the sense of the court on the matter inadvertently admitted, for the benefit of the reviewing authority. After having left the court, and even on a subsequent day, a witness may request to be readmitted in order to correct or amend the evidence he may have given.

Should the prisoner, having closed his cross-examination, think proper subsequently to *recall* the prosecutor's witness in his defence, the witness will then be subject to cross-examination by the prosecution.

Although either party may have concluded his case, or the regular examination of a witness, yet, should a material question have been omitted, it is usually sub-

mitted by the party for the consideration of the court, who generally permit it to be put.*

During the prosecution, *all the testimony* in substantiation of the charges and specifications must be produced, and no further evidence shall be permitted in *proof* of the facts specified, after the prosecution is closed. The protection to the prisoner of his particular line of defence, demands a rigid adherence to this rule.

When the *prosecution is closed*, the judge advocate must enter upon the record a minute to that effect.

**Defence.** The accused then enters on his defence, but before proceeding he may deem it essential to have a day or two for preparation, which is always granted by the court at his request. He then begins his defence by first examining his witnesses, reserving his address to the conclusion of such examination; or he may premise the examination of witnesses with a statement of those defences which he means to support by evidence, deferring his remarks on the address and testimony offered on the part of the prosecution, until after the examination of his own witnesses.

The above is strictly in accordance with the customs of courts-martial; that is, to *close with the prosecution* upon the entire matter in issue, before calling in witnesses for the defence. Where, however, the charges and specifications to be investigated are exceedingly voluminous, and the hearing of the testimony requires a considerable length of time, a departure from the usual mode of proceeding may be justified for obvious reasons, and the court may order the production of the evidence on each separate charge, as far as practicable,

* Simmons, p. 225.

before proceeding with the next. This would simplify the deliberations of the court, and the labors of the reviewing authority, as the evidence on the part of the prosecution and defence would thus be brought in juxtaposition.*

**Address.** The prisoner having finally closed his examination of witnesses, may request reasonable time for the preparation of his written defence. He offers in this address such statement or argument as he may deem conducive to weaken the force of the prosecution, by placing his own conduct in the most favorable light. He has a right to construe the evidence adduced in any way, to draw any deductions from it, and to explain all that may seem to bear against him by argument from facts established, but he has no right to testify for himself by statements not supported by the testimony before the court, or to introduce documents or other evidence which he has neglected to present at the proper time. The utmost liberty consistent with the interest of parties not before the court, and with the respect due to the court itself, should at all times be allowed the prisoner. As he has an undoubted right to impeach, by evidence, the character of the witnesses brought against him, so is he justified in contrasting and remarking on their testimony, and on the motives by which they or the prosecutor may appear to have been influenced. All coarse and insulting language is, however, to be avoided; nor ought invective ever to be indulged in; the most pointed defence may be couched in the most refined language.

It is the practice in our service to allow the prisoner

* Pillow's trial, pp. 12, 384.

the privilege of having his *address read* to the court *by his professional counsel*, or by a military friend. There is no substantial reason for any prohibition in this regard, and the rigid practice in Great Britain has, of late years, been changed, and the cases have been frequent where professional counsel have been permitted to read the written defence. In all cases, at the request of the prisoner, the judge advocate must read the defence, it being his duty to read all papers for the court, that may be handed him by the prisoner.

**Pleas in Bar of Judgment.** A prisoner in his defence may not only negative the allegations contained in the charges and specifications, but may bring forward any matters of excuse or justification, embodying the substance, and in place of pleas in bar of trial. There are also certain grounds of exemption from the censure of the law, that may be brought forth in evidence, embodying the matter and in place of *pleas in bar of judgment*, such pleas being seldom or never made.

Sir William Blackstone observes: "All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will. To constitute a crime against human laws, there must be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will." He then particularizes three cases, in which the *will* does not join with the *act:*

1. Where there is a defect of understanding.

2. Where there is understanding and *will sufficient* residing in the party, but *not called* forth and exerted at the time of the action done.

3. Where the action is constrained by some outward force and violence.

Of the excuses which may be considered by a court-martial, *lunacy* and *intoxication* belong to the first class; *misfortune* and *ignorance* may be referred to the second; and *compulsion or necessity* to the third.

**Absolute insanity,** like total idiocy, excuses from the guilt, and of course from the punishment of a crime committed during this incapacity, but if the lunatic has lucid intervals and reason sufficient to discern right from wrong, he must be held to answer for what he does in those intervals. So far the law is clear and explicit, but difficulties arise in the case of alleged crimes committed by persons afflicted with insane delusions in respect to one or more particular subjects or persons, but not insane in other respects.

**Intoxication** is looked upon by the law as an aggravation of the offence, rather than as an excuse for any criminal act; and the practice of courts-martial is almost universally based on the maxim, that he who is guilty of any offence whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober.* Experience teaches us that drunkenness is the prolific source of most of the serious offences committed in the military state, and the only way of eradicating the evil is by not overlooking the cause in punishing the crime. Besides, the ease with which drunkenness can be counterfeited would render it a ready and safe cloak for palliating the enormity of a crime, were it the custom thus to privilege one offence by the commission of another.

* 1 Hawk., 3.

**Misfortune, or Chance.** It is held that an accidental mischief caused by the performance of a lawful act, excuses the party from all guilt; but if the mischief be the result of an unlawful act—not merely technically illegal, but morally vicious—his want of foresight is no excuse.*

**Ignorance**, or mistake, is a defect of will—as where a man intending to do a lawful act does an unlawful one. Suppose a soldier, firing at a target by order of his superior, kills a bystander, such an act is not criminal. A mistake, however, as to a point of law, is no sort of defence in criminal charges; neither is ignorance of the laws and rules for the government and regulation of the army, or any order officially published, with which it may be the duty of officers of the army to be familiar, admitted as an excuse for their non-observance.

**Compulsion**, or inevitable *necessity*, is a plea that may frequently come in question before courts-martial, and therefore requires particular notice. These are a constraint upon the will, by which a man is urged to do that which his judgment disapproves, and which, it is presumed, his will, if left to itself, would reject. As punishments, therefore, are only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.† This exculpation, admitted by the common law to arise from compulsion, courts-martial would be disposed to extend to acts performed in obedience to the order of a military superior. If death ensue from the fire of a soldier acting under the illegal

* 4 Black., 26. † 4 Black., 26.

orders of his superior, such order would not justify the act in the eye of the common law; and the soldier equally with his superior would be guilty of murder; yet a court-martial would probably consider such necessity as a justification of the act of the soldier. True, the law demands strict obedience to the "*lawful commands*"* of a superior. Unlawful or illegal orders are therefore not obligatory, and it is lawful in a military sense to disobey an unlawful command of a superior. As the recipient of the order must of necessity be the judge of its legality to the extent of his obedience, he disobeys the order at his peril. As long as the commands are not decidedly and flagrantly in opposition to, or in violation of, the laws of the land or the established customs of war, and therefore apparently unlawful to a common understanding without particular reflection or consideration, so long must the commands of a superior meet with prompt and unhesitating obedience. Hesitation in a soldier is, under certain circumstances, a crime; and hesitation is inseparable from reflection and consideration: reflection and consideration, therefore, must, in some sense, be considered as a military offence.

In cases where the legality is doubtful, the safest rule is obedience, "for in all such cases an officer should act upon the reasonable presumption that his superior was authorized to issue an order, which he *might* be authorized to issue. If he acts otherwise, he does so at his peril, and subjects himself to the risk of being punished for disobedience of orders."†

Another species of compulsion or necessity, sometimes pleaded in cases of mutiny or rebellion, arises from

* 9th article of war. † G. O., No. 34, war department, September 4th, 1852.

*threats or menaces* which induce a fear of death or other bodily harm, and which take away, for that reason, the guilt of many crimes and misdemeanors;* but the present fear of death is the only force that does excuse, and this force and fear must continue all the time the party remains with the mutineers or rebels, and must be shown to have been actual force or fear, and not the resultant of an excited imagination. The following case is applicable to the subject and illustrates it. In 1813, a sergeant of His Majesty's 60th regiment of foot, who had originally deserted from the French, entered that regiment by a voluntary enlistment. On the advance of the army into Spain, under the Duke of Wellington, he was taken prisoner by the French. To save his life, forfeited by the act of desertion, he entered into the *corps des étrangers*, set apart in the French service for such men, as an inducement to them to return to it. At the battle of Victoria, he was again taken prisoner by the English, and a general court-martial was ordered to try him for desertion. The first sentence acquitted him of the *act of desertion*, there being the powerful inducement to the act, with the view of saving his life: but the sentence was revised, and it is stated, that on revision, he was sentenced to suffer *death*, and was afterward shot in the presence of that division of the army to which he belonged. It is also understood that it was intimated to the court, that the excuse pleaded by the prisoner was inadmissible, as he should have preferred death rather than to have entered the service of the enemy.†

The facts, in the above cited case, seem not to have

* 4 Black. 29. † Hough, p. 364.

been clearly stated. For, if he was taken *prisoner* by the French and entered their service to save his life, the act, though most reprehensible, was *not desertion*, the circumstances amounted to compulsion, *pro timore mortis*, and he was therefore excusable. If, however, he actually *deserted from* the English, and afterward falling into the hands of the French, he thus endeavored to save his life, the verdict of the court-martial was just, and he deserved to die for desertion.

**Reply.** The prisoner having closed his defence by delivering his written address, the judge advocate has the right to reply. By a *reply* is meant, a right of remarking by argument upon the evidence in general, and upon the address of the accused, and of controverting by testimony any *new matter* that may have been introduced by the accused in his examination in chief of witnesses. He can, however, only adduce fresh evidence when *new matter* has been introduced in the defence; as, for example, a prisoner is charged with mutiny, and the charge is clearly proved, but in his defence the prisoner brings evidence to show that he committed the act under compulsion, against his own will, and in fear of his life. This being *new matter*, to which the evidence of the prosecution does not at all apply, and which could not in reason have been anticipated, the judge advocate is permitted to refute it, if possible, by the examination of witnesses or the production of documents. So also, should the accused have entered on an examination reflecting on the credibility of the witnesses for the prosecution, the judge advocate is allowed not only to address the court in reply, but also to examine witnesses to the new mat-

ter for the purpose of re-establishing the *character* of his witnesses, whose testimony has been impeached.

The court, being *the judge* of what is new matter, must be extremely watchful to prevent the judge advocate from examining any point not introduced as new matter by the prisoner. Neither should he be permitted to examine on any points which might have been foreseen prior to the defence of the accused. For Lord Ellenborough has well remarked: "If any *one fact be adduced by the defendant*, to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact, he cannot go into general evidence in reply to the defendant's case; there is no instance in which the plaintiff is entitled to go into half his case, and reserve the remainder."

When the judge advocate has been allowed to *adduce evidence* in his reply, to controvert *new matter* introduced by the defence, the accused is permitted to cross-examine such witnesses to the extent of the examination in chief. In this case, he is also entitled to a *rejoinder* in which he may attempt to invalidate its effect; but he is not permitted to call witnesses except for the purpose of re-establishing the credit of such witnesses as may have been impugned by the witnesses for the prosecution in the *reply*.

A second reply, or *sur-rejoinder* may be allowed to the prosecution, to an extent limited by the arguments of the accused in his rejoinder. But where these various addresses are necessary and called for, recent practice and usage have been more in accordance with the prevailing impression, as it is laid down by Sir

Charles J. Napier, that "the prisoner has the right to speak last." This is more conformable with the generous principles of the military law, derived not from the written rules and articles, but from the custom of war.

**Recall Witnesses.** After the prosecution and defence are closed, and the court has been cleared for deliberation, it is still competent for a court-martial to recall a witness for such examination as may be deemed essential, the parties, however, being present. And indeed, the court is at liberty, at any stage of the proceedings *before the finding*, to recall evidence for such purpose, but this does not authorize the court to originate evidence by calling witnesses not produced by either party. The extreme limit, in this respect, to which a court is justified in going by the custom of service, is the calling as a witness, any individual alluded to in the evidence before the court, for the purpose of elucidating any doubtful point.

## CHAPTER XI.

## THE FINDING.

The judge advocate and prisoner having laid their case before the court, the latter is cleared for deliberation, in order to decide upon the question of guilt.

**A fair copy of the record** of the proceedings is read over by the judge advocate, which answers the purpose of bringing to the view of the members, the entire evidence in a connected chain. As the fair copy is daily compared with the original manuscript in the presence of the court, during the reading of the previous day's proceedings by the judge advocate, the members are positive that it is a faithful record of the evidence. In intricate cases and where the testimony is voluminous, the judge advocate shall be prepared with an index for easy reference to the record.

In deliberating upon the evidence, and its bearing upon the several points of accusation involved in the specifications, it is the practice of courts-martial for members to indulge in *a free and open conversation*, with a view to a more full and correct understanding of the case in its various ramifications, and, if possible, to harmonize conflicting opinions, in regard to the relations existing between the facts as alleged in the specifications and the crime as set forth in the charge. In this discussion, the utmost care should be had by each mem-

ber not to intimate his own final opinion and vote, so as to avoid any influence that such intimation might have on the vote or opinion of another, otherwise it would have the effect of counteracting the intention of the law, which requires the junior to vote first.

Mr. Tytler very properly remarks, that the "members should reason and deliberate separately on each charge (and specification); candidly discussing the import of the evidence, and allowing its full weight to every argument or presumption in favor of the prisoner." The paramount object of every member should be perfect impartiality. He should divest himself of every desire to see the innocent suffer or the guilty escape; should not permit false pity or undue severity to influence his judgment; and should keep constantly in mind the requirements of his oath, to "well and truly try and determine according to evidence the matter" now before him, and to "duly administer justice without partiality, favor or affection."

At this stage of the proceedings, *the duty of the judge advocate* being simply to act as registrar of the court, and to advise on legal points when his opinions may be claimed, he necessarily abstains from making any remark by which his judgment as to the guilt or innocence of the prisoner may be ascertained.

The court must bear in mind that they are bound to exhaust all the charges and specifications that have come before them, by expressly *acquitting or convicting* the prisoner, severally, of each specification and of each charge.

**Voting.** Having ascertained that the members are ready for the vote, after full examination of the evidence

and mature deliberation thereon, the president signifies the fact to the judge advocate. The latter then reads, in consecutive order, the specifications to the 1st charge, and then the first charge, and so on with the other charges and specifications; taking the votes in succession, by addressing each member, beginning "with the youngest in commission."*

The judge advocate notes the vote of each member as he gives it, but this *memorandum must be destroyed* when the aggregate opinion or decision of the court has been determined and recorded. Whether this memorandum should be preserved or destroyed, has given rise to some discussion. The oath taken by the members, as well as that by the judge advocate, contains the same words, as follows: that you will not "disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law," and, consequently, the same reasoning that would require a judge advocate to retain such a memorandum would necessarily apply with equal force to every member of the court. The loss of either of these would reveal at a glance the vote of every individual, and the knowledge of the existence of such a paper in the possession of the judge advocate alone, would undoubtedly exercise an evil influence upon members in their rigid administration of justice, as a mere accident might give publicity to the secret record. The cases are extremely rare when such information may be required by a court of justice, and the evil that might result from a defective memory in the event of such a

* 72d article of war.

call, would be slight in comparison to the dangers to the administration of impartial justice that would assuredly follow its universal practice. The rule then should be, that no written minute of the votes be preserved, unless so ordered by the unanimous voice of the court.

As the oath provides for the concealment of the vote of each particular member, it would be a direct violation of it to say that the vote was unanimous, whether for acquittal or conviction, thus making public the opinions of all. It would also be highly reprehensible to state what number voted for the particular decision of the court, as it might afford a clue to individual opinions.

The conviction or acquittal of the prisoner is determined by a *majority of votes, except* in cases where the law condemns him to suffer death upon conviction, leaving to the court no discretion, as is declared by the 55th article of war, for forcing a safeguard in foreign parts, and by the 2d section, concerning spies.* For the 87th article of war declares that no person shall be sentenced to suffer death but by the concurrence of *two-thirds of the members* of a general court-martial, nor except in the cases herein expressly mentioned, and therefore, in the cases above referred to, where the sentence of death is affixed by the law to his conviction, that conviction cannot be declared but by a two-thirds vote. The record must explicitly state that two-thirds of the members concurred therein, in all such cases of conviction, as well as in all other cases where the accused is sentenced to suffer death at the discretion of the court. This is important in the decision of so grave

* See act approved Feb. 13th, 1862, sec. 4.

a question as that of life and death, and shows, moreover, that the requirements of the law have been strictly followed.

**Votes Divided.** Should the court be reduced to an even number, by its organization, or by sickness or death, and their votes be equally divided as to the finding, the prevailing custom is, that the prisoner shall have the benefit of an acquittal.

**The Verdict.** Instead of a general verdict of guilt or acquittal upon the whole of every specification, the court may find a *special verdict*, that is, the accused be found guilty of a portion of the specification, and not guilty of the remainder; or may find him guilty of the facts as set forth in the specification, but attach no criminality thereto; or may find him guilty of a portion, and find the facts as stated in the remainder, but declare them void of criminality. The prisoner must, however, be acquitted or convicted of every part of each of the several specifications and charges of which he stands accused, and the decision of the court in all their findings must be specific, so that the quantum of punishment inflicted may be seen to be proportionate to the degree of guilt.

The accused may be found guilty of the entire facts set forth in the specifications, and yet be acquitted of the charge. This may happen in constructive charges, where the essence of the charge and the guilt of the prisoner rests on imputations built on the facts alleged in the specification—as that there was criminal knowledge or intent—but of which he has been cleared by the testimony.

*In illustration* of the above, suppose the charge to be

laid under the 45th article of war, "*Drunkenness on duty*," and the accused be found guilty of the specifications set forth to cover the charge. In such a case he must be found guilty of the violation of the 45th article of war, or be acquitted. The court cannot find the accused guilty of the specifications as an offence under the 99th article—"conduct to the prejudice of good order and military discipline." "It is true that a court-martial has cognizance, under the 99th article, of all offences against military discipline though not named in the other articles, yet it is necessary that the offence against the 99th article shall be duly and regularly charged, in order that the accused may have notice of that to which he is to answer. A charge of one of the specific offences defined in other articles of war is not notice of a general charge of some disorder or neglect within the purview of the 99th article.*

Again: on the charge of "*conduct unbecoming an officer and a gentleman*," the court returned a special finding upon the specifications, and the following finding upon the charge: "Not guilty of the charge, but guilty of conduct unbecoming an officer, and to the prejudice of good order and military discipline."

"There is no such offence known to the articles of war as conduct unbecoming an officer. The unbecoming conduct of a commissioned officer of which the law takes notice, and authorizes a court-martial to take cognizance, is '*conduct unbecoming an officer and a gentleman.*' There is no minor indecorum, no unbecoming conduct not unbecoming an officer and a gentleman, that the law submits to the jurisdiction of a court-martial, and the court in pro-

* G. O. No. 7, War Department, June 18th, 1856.

nouncing the conduct of Lieutenant S—— 'not unbecoming an officer and a gentleman,' have acquitted him of the legal charge before them. At the same time they give judgment against him under the 99th article of war. He was not charged with any offence under that article. If charges are so drawn as to bring them expressly, and exclusively, under particular articles of war, a court-martial cannot convict under other articles.

"The sentence of the court-martial in this case is, therefore, *void*."*

Again: on the charge of "*illegal conduct to the prejudice of good order and military discipline*," the court confirm the plea of guilty made by the accused to the 1st and 2d specifications, "find the facts set forth, but attach no criminality thereto." The following was the decision thereon. "In this trial, it was shown by the defence, that the citizen who was flogged at the guard-house, had entered the barracks, armed, and beat a soldier; and that no civil tribunal to punish the offence was nearer than one hundred and seventy miles. But shall the army assume to remedy the defects of the administration of the civil laws? A court-martial has here adjudged that no wrong is done by an officer who causes his guard to flog a citizen. * * * The virtual acquittal on the 1st and 2d specifications is disapproved.†

Again: at a court-martial, the accused is convicted of "*signing a false certificate of transportation*," but acquitted of signing the same "*knowingly*," which was the fraudulent intent imputed to him in the matter.

* G. O. No. 8, War Department, July 23d, 1856.

† G. O. No. 6, War Department, June 21st, 1858.

The War Department was of opinion that this finding entitled the accused to an acquittal, and is in legal effect, an acquittal.

"It is not necessary in military charges to allege that the acts were done 'maliciously,' or 'wilfully,' or 'knowingly.' A specification of fact is good without such expressions. But if they are alleged, and are negatived by the court in their verdict, then the inference from the fact fails, and the accused being acquitted of the intention, is acquitted of the offence. That is certainly the legal effect and meaning of such finding. What other meaning was in the mind of the court, is matter of doubt. They find that the accused did not '*knowingly*' sign; meaning, probably, that he did not know the certificate was false. Then did he sign it in good faith, to the best of his knowledge and belief? or in such ignorance and disregard of what he certified as made the certificate an act of bad faith? In that finding of the specification, it sustains the charge. But the court negative the charge, and therefore reject that sense of the specification."*

Although it be settled that a prisoner cannot be convicted of an offence *different* from that with which he is charged, it is equally well established, that a court-martial can *convict of a lesser degree of the same offence* alleged against him. It is therefore necessary to note the distinctions, if any, between the crime charged and the actual degree of offence proved. A prisoner may be acquitted of the charge of *desertion*, but be convicted of the lesser offence *absence without leave*. Although these two offences are to be found in two distinct articles of

* G. O. No. 28, War Department, Dec. 31st, 1859.

war, yet desertion is but an aggravated degree of the crime of absence without leave, and necessarily includes it; the *intention not to return* constituting the aggravation. The new British mutiny act and articles of war of 1852, contain a provision that soldiers, tried for desertion, "may thereupon be found guilty either of desertion or absence without leave," thus legalizing what has been the universal practice in that service.

While a court may convict of a *lesser* kindred offence, it cannot, under any circumstances, find the accused guilty of a higher degree of criminality than that alleged in the charge.

The various degrees of culpability must be taken into consideration for every act that may be divided into offences of greater or less magnitude, and the court should confine themselves to the evidence of commission of the crime specified, when deliberating upon the question of guilt or innocence. Any evidence in mere *palliation or extenuation* must be allowed its due *effect upon the sentence* and not upon the finding. A soldier striking his superior officer being in the execution of his office, must be found guilty of a violation of the 9th article of war—mutiny—and the extenuating circumstance that he struck under the wild excitement of excessive provocation, can only be considered when deciding upon the sentence.

**The manner** in which an *acquittal is expressed*, often varies, and the different formula used convey a more or less favorable judgment on the innocence of the accused. Such an acquittal as that "*the charges are not proved*," should never be recorded, as it is calculated to strengthen the imputation engendered by the charge,

and may prove most injurious to the accused, especially in such cases as affect the honor of an officer. The court is sworn to truly try and determine the matter before them according to the *evidence*, and where the evidence does not prove the guilt of the prisoner, he is entitled to an acquittal on that just and reasonable maxim, that in the eye of the law the accused is innocent until proved to be guilty.

**Frivolous and vexatious accusations** growing out of the personal ill-will and animosity of the accuser, being developed in the course of the trial, have been made the subject of *severe censure by courts-martial*, and their observations have met with the approval of the revising authority. So also has it been declared that the accuser was only actuated by a sense of duty and a sincere regard for the benefit of the service, or that his conduct has been honorable and impartial; such remarks being called for by the insinuations of the prisoner, unsupported by evidence. Such observations for or against the accuser may accompany either an acquittal or conviction.

Courts-martial may **animadvert on the conduct of witnesses**, and cases have arisen in the British service where officers have been stricken from the rolls of the army for their conduct as witnesses before a court, "as amply borne out by the minutes of their evidence," and in consequence of the serious animadversions passed by the court on such conduct. Courts-martial have sometimes observed, in terms expressly charging perjury or falsehood, on the mode in which witnesses have delivered their testimony; sometimes they have implied censure, at others praise. They have also observed on the causes

which have led to the trial, implicating the conduct of individuals not before the court, but this should only be resorted to in extreme and particular cases, as it seems opposed to the most obvious principle of justice, that an individual should not be censured unheard, unless he purposely keeps out of the way to withhold evidence which he may be competent to afford.*

"The question having been raised of the authority of a general court-martial, by proper animadversions, to bring to the notice of the military commander, to whom the proceedings are sent, any conduct of the prosecutor or other military persons, which may be developed before the court in the due course of trial, the general-in-chief thinks it proper to affirm such right in clear cases, as one well settled by the practice of armies, and that its judicious exercise tends to promote justice and discipline."†

In all such cases of misconduct, it is proper that the animadversions of the court should be clear and specific, and in a manner that might be acted upon by the revising authority, with a view to bringing the offender before a court-martial for trial. This power of observing upon and censuring any inconsistencies or prevarications of witnesses, must be exercised with regard to military persons only, who, if the opinions expressed be erroneous, can appeal to superior authority for immediate redress. In the case of civilians so censured, every individual member of the court would be liable to an action for defamation on the part of the person so censured, who could obtain no redress except through process at law.

*Simmons, p. 257. †G. O. No. 3, January 27th, 1853.

**The votes** on the finding having been received by the judge advocate, *are submitted to the court.* It is not necessary that the opinions be given *viva voce*, as the law merely requires that the members "in giving their votes, are to begin with the youngest in commission;" the evident intent of the article being that the younger members may not be influenced by the opinions of those more experienced. In important cases, and when deemed essential, each member writes on a slip of paper his name and the opinion *guilty*, or *not guilty*, or with such modifications and exceptions as are just. These slips are handed to the judge advocate, who announces the verdict. Should there not be a majority or number sufficient to determine it, the fact is stated, and after further discussion, another vote is taken, until the finding is declared. The mode is followed upon every specification and charge, and it has the advantage of concealing the votes of the individual members until a verdict is adopted, when the opinion of each member is read aloud by the judge advocate.

**The finding** thus declared, *is the decision of the court.* Should the vote upon it not have been unanimous, the minority are however strictly bound by the decision.

## CHAPTER XII.

## THE SENTENCE.

Having in their finding, declared the innocence or guilt of the prisoner, the court then pronounce his acquittal, or proceed to award punishment according to the nature and degree of the offence.

**Punishments.** The punishments which courts-martial have the power to award are either *peremptory*, that is, specially enjoined by the letter of the written law for a specified offence; or *discretionary*, that is, where the kind is specified but discretion as to quantity is left to the court, or, where neither kind nor quantity being specified, both are left to the discretion of the court, the same being authorized by the rules and articles of war, or in accordance with the custom of service. For instance, the 83d article enacts that "any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service." The act of the court in passing sentence in such a case, is therefore ministerial rather than judicatory. A majority finds and sentences.

Where *death* is the fixed penalty for a crime committed, the *finding* of *guilt* must be passed by a two-thirds vote, because the death penalty which immediately attaches to conviction in this case, requires a two-thirds

vote for its infliction. For instance, the 55th article states that "whosoever, belonging to the armies of the United States in foreign parts, shall force a safeguard, shall suffer death."* Here the court is the mere mouthpiece of the law to pronounce the punishment fixed by it, and therefore the guilt that carries death with it, must be declared by the same voice.

In most cases, however, the articles of war do not annex a fixed and invariable punishment for offences, and as courts-martial—except in sentences to suffer death—declare their opinion by a majority of votes, the question arises, how far the *minority is bound by the finding of the majority*, when the *sentence* is to be determined? There can be no doubt that the opinion of the majority is the opinion of the court, else on an interlocutory decision as to the admission of evidence the minority may decline to be influenced by the testimony which, according to their *individual* judgment, was irregularly admitted. Unanimity of opinion in questions of law and fact is a bare possibility, and such a requirement would effectually bar the administration of justice. It must also be considered that a court-martial acts in the twofold capacity of judge and jury; as judge, to administer justice; as jury, to truly try and determine according to evidence; and as the law has nowhere intrusted this last, or any other, function to a *fraction only* of the court, the finding of the verdict is the finding of the court as a jury, and exhausts their powers as jurors. In proceeding to the sentence they act in the capacity of judges, independent of their individual votes as jurors, to award punishment equal and adequate

* See act approved Febrbary 13th, 1862, section 5.

to that degree of guilt declared by the court, as a jury. In other words, the court is to administer justice on a person already convicted.

The sentence of the court, in cases not discretionary, is in strict accordance with the finding, and must be inflicted by the court, in obedience to the law, regardless of individual sympathies or opinions. Here the court, as judge, passes the sentence fixed by the law to the crime of which the prisoner has been convicted by the court as jury; not by a unanimous voice, but at most by a two-thirds vote, the extreme vote required by the law. It is therefore the duty of each member to vote on the sentence regardless of the fact, that on the finding, his vote was for an acquittal. Each member must not only vote, but must discard all personal sympathies, and act without partiality, favor, or affection; for were the minority to vote for the most lenient sentence because of their individual belief in his innocence, and regardless of the verdict, the punishment awarded might be very disproportionate to the degree of offence, and not in unison with the requirements of justice.

Simmons cites a case that occurred in India in 1830, and the decision of the commander-in-chief was, that "Upon a finding of guilty by a court-martial, I am of opinion, that although all the members of the court may not have concurred in it, it must be deemed the finding of the whole; and the members who voted for acquittal, may be called upon to vote upon the punishment to be awarded on the prisoner, as if they had concurred in the finding of guilty."* The practice of our service is in accordance with this rule, and may be considered as

* Page 268.

a positive and certain rule for the guidance of courts-martial.

**Votes.** If a member should vote for death, which is not carried by two-thirds of the court, he must vote some other punishment. All members must vote some legal sentence, and if that which any member votes for is not carried, some punishment must be voted till a majority agree as to one punishment.

Should the court be equally divided as to the nature or quantum of punishment, the practice has been to give the prisoner the benefit of the more lenient judgment. This, however, seldom happens, as on the reconsideration of the question, some member is apt to be found to lean to the side of mercy, and the ultimate opinion of the majority is the decision of the court.

The court *may adjourn* from day to day to consider their finding or sentence. This power in a court-martial to take time for deliberation, is of great importance in military trials; enabling the members to consult authorities and inform themselves upon questions involving legal proprieties.*

With regard to the *wording* of the sentence, no particular form is necessary in cases that are *discretionary* with the court, except that it be expressed in clear and unambiguous language. In *peremptory* cases the sentence should be expressed in the very words of the statute, to obviate all doubt and cavil.

**Capital Punishment.** The custom of war has, in the absence of statutory law to that effect, determined that capital punishment be inflicted by shooting or hanging. Mutiny, desertion, or other military crime is commonly

* De Hart, p. 193.

punished by *shooting;* a spy is always *hanged*, and mutiny accompanied by loss of life is punished in the same manner; the mode, in all cases, should be declared in the sentence.

**Motives.** Where the law has left the sentence discretionary with the court, allusion may be made to the motives that have actuated it in determining the sentence, as for instance: "The court is thus lenient, believing the accused to have acted more from thoughtlessness than from any intention of wrong."

In *illustration* of the above, the following sentences, and decisions thereon, are cited:

1. The court find the prisoner "*guilty*" *of the specification to the* 1*st charge*, and "not guilty" of the 1st charge, and "not guilty" of the 2d charge and its specification, and do sentence him "to forfeit his pay for six months, and to be confined at hard labor during the same period." The proceedings of the court in this case are disapproved; the court, although finding a part of the facts alleged against the prisoner, having acquitted him of both the "charges preferred, proceeded irregularly in passing sentence upon him."*

2. The attention of courts-martial is directed to so much of the 18th section of the act of March 16th, 1802, as provides, that a *deserter* shall be "liable to serve, for, and during such a period, as shall with the time he may have served previous to his desertion, amount to the full term of his enlistment." This provision not being positive, it is necessary to embody in the sentence of the court, in every case of the conviction of a deserter, that he shall make good the time lost by his absence

* G. O. No. 69, Head-Quarters of the army, Dec. 30th, 1843.

from the service—if such be the intention of the court.* By the general regulations, in reckoning the time of service, the deserter is to be considered in service when delivered up as such to the proper authority.

3. As doubts have arisen in regard to the punishment which a court-martial may inflict under the 45th article of war, on non-commissioned officers and soldiers, it is deemed advisable not to charge offences under that article, but under the 99th article.

Courts-martial, except in cases which may arise under the 32d article of war, have not authority to find a verdict of debt against a soldier, and to direct, by their sentence, the payment of debts to sutlers or other persons. They may, if they see fit, in order not to deprive a soldier of the means of discharging honestly his proper pecuniary obligations, ascertain the amount due from him to the sutler and laundress, and except that amount, *as a sum stated*, from the fine or forfeiture imposed in the sentence; but such amount so excepted, must be paid to the soldier, and the court cannot direct its payment to any other person.†

A court-martial cannot assign and make over the pay of a soldier to any other person, and the receipt of such person will not be a sufficient voucher for the disbursing officer. Nor can a soldier be required to receipt for money paid without his consent to another person. The law prohibits any receipt or voucher in accounts of public money, unless the full amount of the receipt is paid to the person who signs it.‡

* G. O. No. 45, Head-Quarters of the army, July 15th, 1843.

† G. O. No. 51, Head-Quarters of the army, April 3d, 1851.

‡ G. O. No. 2, War Department, Feb. 28th, 1857.

**Record.** Every court-martial shall keep a complete and accurate record of its proceedings, to be authenticated by the signatures of the president and judge advocate; who shall also certify, in like manner, the sentence pronounced by the court in each case. When the sentence is, therefore, entered upon the record, it is signed by the president and judge advocate.

**Modifying the Sentence.** At any time previous to their final adjournment, the court are competent to modify or *change the sentence* already passed by them.

In the case of Peter Williamson, tried in June, 1819, for desertion, and to which he pleaded guilty, the court sentenced him to "confinement at hard labor with a ball and chain, &c.;" but on the ensuing day, at the suggestion of a member, the sentence was reconsidered, and after due deliberation the court substituted the following: "That he, the said Peter Williamson, be shot to death." The question was submitted to the attorney-general, whether the court had the power to change the sentence, as above stated?

"In courts of civil jurisdiction, when sitting even in criminal cases, the court is not concluded by an opinion they may have expressed in any one day, but has the power to reconsider, the whole subject being completely within its control until the end of the term. And I am not apprised of any difference in the powers of the two courts over the subjects which severally belong to them during the continuance of their respective terms. If a civil court of criminal jurisdiction, therefore, may lawfully reconsider and alter during the term, any opinion which it may have pronounced on a previous day of the same term; so, in like manner, I conceive may a court-

martial. * * * A general court-martial convened for general purposes, continues a court with full powers while it has any business to do, of which it alone is the judge; and while it does so continue a court, its power of judicial deliberation and decision over all the subjects which may have been brought before it is as full on the last day of its sittings as on any preceding day. I am of the opinion that the court had the power to alter the opinion they had expressed on the preceding day, and that their final opinion is regularly and legally pronounced."*

The above opinion covers the case where the court, with the same members, made both decisions. There seem to be doubts entertained *whether this power is vested in a mutilated court.* "However it may be asserted that the usage and laws of courts-martial, may sanction the right of the court to annul and entirely change their positive decision at any time before their final adjournment, yet it is a right which should be cautiously exercised, and only on obvious and extraordinary occasions. In the present instance, a full court acquitted the prisoner; and upon the next day a mutilated court—one member being absent—undertake to rescind the judgment of the previous day, and to pronounce the accused guilty and sentence him to punishment. To justify such a reversal, the court should be as full, and constituted precisely as it was, when the first judgment was pronounced. In consequence of this irregularity, the proceedings of the court are disapproved."†

* Opinions, Aug. 29th, 1819.

† G. O. No. 40, War Department Oct. 14th, 1844.

This view of the case is not, however, upheld by a recent opinion of the attorney-general, in which it was decided, that the *absence* of members, on the reassembling of the court by the proper authority for the *revision* of the original proceedings, did not invalidate its final action, provided always that the number reassembled did not fall below the minimum fixed by law.*

**Recommendation.** Should one or more members see fit to recommend the prisoner to mercy, because mitigating circumstances have appeared during the trial which could not be taken into consideration in determining the degree of guilt, or the extent of punishment, their recommendation will not be embraced in the body of the sentence. It is provided by regulation that those members only who concur in the recommendation will sign it. They should carefully avoid pointing out any particular mode in which the prisoner may be deemed worthy the clemency of the reviewing authority.

The recommendation, *not being an act of the court*, but the mere expression of the wishes and opinions of the individuals who sign it, must not be entered as part of the proceedings, but be appended to them. It does not of necessity indicate the votes, upon the finding or sentence of the subscribing members, but has the effect of directing the attention of the reviewing authority to those parts of the evidence that tend to mitigate the gravity of the offence.

* Opinions, July 12th, 1855.

## CHAPTER XIII.

## REVISION AND CONFIRMATION OF SENTENCE.

By the 65*th article of war*, it is prescribed that "no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial," &c.*

**Revision.** There is no special authority given to remit the proceedings back to a court-martial for reconsideration or revision, unless it be implied in the above-quoted article, in the words "for his confirmation, or disapproval and *orders in the case*." But this power seems to flow directly from the very constitution of courts, as a consequence of the right of confirming and disapproving the sentence; it has been fixed by the custom of war, in the absence of special legislation, and is now the established practice in our service.

In the British service, the mutiny act of 1750 prohibits the approving authority from sending back the case for revision more than once. Although there is no such restriction in our rules and articles, the belief has been expressed by high legal authority, that this power

* See act approved December 24th, 1861.

is under the same limitation as in Great Britain, and by equally high authority, that in our service the proceedings may be remanded as often as the superior authority shall deem necessary for attaining the purposes of justice. A single revision would seem to be ample and sufficient to meet the ends of justice; its object being to permit the court to reconsider their action with the aid of the new light thrown upon the case by the remarks of the reviewing authority.

None other than the approving authority has the right to send back the proceedings for revision, nor can this be done in any case, after the court has been *dissolved* by this same authority.

**Proceedings.** No witness shall be examined, nor additional evidence received by a court-martial on revision. The court does not rehear the case, but confines itself exclusively to a reconsideration of the record for the purpose of correcting or modifying any conclusions thereon, and weighing with impartiality the suggestions made by the reviewing authority. The court cannot alter or obliterate any part of their previous proceedings, or expunge from the record any testimony, although illegally admitted. The proceedings of the court during the reconsideration, together with the written instructions from the approving power, must be made up separate and distinct, and appended to the previous record, leaving the latter perfectly intact.

**Causes.** The principal cause for requiring courts-martial to revise their judgments is, where an insufficient or undue weight has been given to the testimony, and is supposed to have arisen from inadvertence, misconception of the law, or the custom of war; or where

an exorbitant, inadequate, or illegal punishment has been awarded.* Any illegality as to the constitution of the court, or any defect in its composition, cannot be amended on revision; neither can any illegality as to the charge be remedied. Such flaws must of necessity invalidate the proceedings to such a degree as to render any sentence or finding entirely innoxious to the accused, and so entirely annihilates the court as to expose him to trial by another court.

**New Trial.** If the court be a legal court of competent jurisdiction, and act illegally, the prisoner cannot be again tried except on his own motion for a new trial. If it be an illegal court, all its proceedings are null and void *ab initio*, and there thus being no trial, the accused may be brought before a proper court to be tried. If the court be a legal court but without competent jurisdiction, a trial by such a court is not a valid plea in bar of trial before a legal court of competent jurisdiction. As, for instance, taking an extreme case, the trial of a commissioned officer by a regimental or garrison court would not be considered a good plea in bar. The 67th article states that "No garrison or regimental court-martial shall have the power to try capital cases or commissioned officers." Yet the trial of an officer by such inferior court, is a trial by an intrinsically legal court, true, but having no jurisdiction over such individuals, its action is as void as if cognizance of a military offence was taken by an ecclesiastical court. An inferior court has no lawful cognizance where the trial of an officer is concerned, and its action is null and void from its very inception.

* De Hart, p. 205.

A new trial may also be granted, when the finding of a court-martial is founded on *irrelevant matter*, or is *not supported by*, or is *contrary to the recorded testimony*. In the case of Captain Hall, tried by a general court-martial in 1818, and sentenced to be cashiered, which sentence was disapproved, an appeal was made by the prisoner to the President, on the ground that the court had excluded certain evidence that was both legal and material for the defence. The new court ordered for his trial, refused to arraign the accused, because he had been previously tried by a court-martial on the same charge, and that a new trial was forbidden by the 87th article of war. The question then arose as to the power of the President to grant a new trial, and the attorney-general, Mr. Wirt, gave an elaborate and conclusive opinion thereon.

"It is very apparent that the whole of article 87 is designed *for the benefit* of the party accused, not for his prejudice. The President of the United States has the power to order a new trial for the benefit of the prisoner. The sentence of a court-martial in case of death or dismission, is not perfected until it shall have received the approbation of the President. His approbation is necessary to consummate the measure, and his disapproval *annihilates* the sentence; the case stands as if there had been no trial, and is just as open to an order for a court-martial, as it was in the first instance. * * * The plea *is his* (the prisoner's) *privilege*, which he may either use or waive at his pleasure; and if he does not use it, however the fact may be, the court will not take notice of it so as to bar the trial. In the present instance, the prisoner expressly waived the plea and in-

sisted upon his trial. The previous trial, therefore, was not in issue before the court."*

**Mutilated Court assembled for Revision.** When a court-martial has lawfully reassembled for revision, some of its members being absent, but a legal quorum of the court present, the question has arisen, whether it was competent to go on as the same court which has passed the original sentence, and to revise or modify it on a reconsideration of the record? The opinion of Attorney-General Cushing on this point is, that the absence of the members at the reassembling of the court, did not impair its jurisdiction, or otherwise injuriously affect the legality of its action; and that it still remained the same continuous and competent court as when it first assembled under the orders of the department. He grounds this opinion on the analogy that exists between courts-martial and juries, the appointing power having something of the same relation to the former, that the judge at *nisi prius* has to the latter; that the grand jury has always consisted of members changeable in numbers and personality within certain limits, acting only by a quorum vote, without necessary unanimity; and that it is no inherent necessity which forbids a traverse jury to undergo personal change in the course of a trial, but merely the arbitrary discretion of the law-making power. He also refers to the fact that no law or regulation requires all the members of the court, who participated in the original proceedings, to continue present until the time of their conclusion; and that the members who reassembled would have been competent to try the case when originally submitted.† However

* Opinions, Sept. 14th, 1818. † Opinions, July 12th, 1855.

just and proper this may be in law and equity, revision by a mutilated court should not be encouraged in practice. Taking an extreme case; an original court of thirteen members might be reduced by unavoidable circumstances to the minimum of five for revision, and the action of this minority might by its revised decision annul and upset the matured and decided action of the majority. Such a case would carry with it so palpable an appearance of injustice, as to effect more detriment to the service by its silent operation, than would be compensated by the individual justice it might have administered. Whatever tends, in the slightest degree, to cast a shadow upon the unsullied purity of our military tribunals, should be avoided with all the care commensurate with the strict and impartial administration of justice.

**Confirmation.** The duties of the reviewing officer are distinctly set forth in the 65th article of war, and accordingly no sentence can be carried into execution until after "the whole proceedings" shall have been by him "*confirmed*." This confirmation is usually affixed, with his signature, to the proceedings, and the decision is published in orders. Should the proceedings of the court be "*disapproved*" by him, he may reconvene the court for revision, or release the prisoner from arrest, and order him to duty. Minor errors would be noticed, and might modify the action of the reviewing authority, but not necessarily lead to a disapproval of the entire record. If the sentence be too severe, or, on the other hand, too inadequate, for the offence of which the accused stands convicted, the same authority might use his discretion in either sending the proceedings back for revisal, mitigating, remitting, or confirming the sentence.

When, upon revision, courts-martial adhere to the judgment first pronounced, this adherence is accompanied by a statement of their reasons for so doing. In such cases, the reviewing authority may confirm the proceedings, should nothing illegal therein prevent, that the convict may not go unpunished; or may remit, or mitigate the same, at his discretion.

*Provocation*, according to its kind and degree, and the nature of the act committed in consequence of it, may justify or excuse that act. *Extenuating circumstances* may be properly considered by the approving authority, and indeed, it is the right of the accused that all the circumstances of his case should be reviewed by that authority which decides finally upon it.

**Mitigation of Punishment.** By the 89th article of war, "every officer authorized to order a general court-martial, shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer; which, in the cases where he has authority (by article 65) to carry them into execution, he may suspend, until the pleasure of the President of United States can be known; which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison, where any regimental or garrison court-martial shall be held, may pardon or mitigate any punishment ordered by such court to be inflicted."*

The power is hereby expressly given to every officer, authorized to order a general court-martial, to pardon

* See act approved Dec. 24th, 1861.

and mitigate any punishment ordered by such court, except the sentence of death, or of cashiering of an officer; these can only be pardoned or mitigated by the President of the United States.

In the case of Major Whistler, the following opinion was given by the attorney-general: "In those cases which, by the rules and articles of war, are required to be submitted to him, the whole proceedings are required to be transmitted to the secretary of war, to be laid before the President 'for his confirmation or disapproval, and orders in the case.' The terms indicate an unlimited discretion; and when it is considered, that he is, by the constitution, the depositary of the pardoning power —that this is coextensive with every species of punishment, except only in cases of impeachment—it cannot, I think, be doubted that he has authority to mitigate as well as to confirm or reject the sentence of a general court-martial, in the exercise of the supervisory power committed to him by the act for establishing the rules and articles, for the government of the armies of the United States. It would be singular if, in the cases which are intrusted to the supervision of a subordinate officer (see 89th article of war), a power should be given to him over the sentence of a court-martial, which is denied to the commander-in-chief, in those cases which are referred to him."*

The power to pardon all offences against the United States, except in cases of impeachment, is given to the President, by the constitution; and his constitutional power to grant a conditional pardon, offering to commute the sentence of death to that of imprisonment for

* Opinions, Nov. 3d, 1829.

life, is affirmed by the Supreme Court.* And Attorney-General Crittenden, in the case of an Indian sentenced to be hung for murder, says: "The general power of pardoning conferred by the constitution upon the President, includes the power of pardoning conditionally, or of commuting to a milder punishment that which has been adjudged against the offender. The commutation of the punishment is but a conditional pardon; and that the President may grant such a conditional pardon has been always recognized and decided."†

The question, then, which has arisen denying to the President the power of *commuting*, because under the above-quoted article of war, the word "*mitigate*" is only used, which does not include "*commute*," necessarily falls to the ground, as the Supreme Court, the sole judge of the constitutionality of laws and acts, has affirmed this as flowing directly from the pardoning power, and what is granted by, or implied in, the constitution cannot be annulled by express laws, much less by mere inference, as above.

To *mitigate* a punishment, is to make it less in degree, preserving the same species. To *commute*, is to substitute a punishment of a different species. There are only two kinds of punishments recognized and authorized by our military laws, which admit of no degrees of severity:—they are, death and cashiering, or dismission; but when such a sentence is adjudged by a court-martial, its pardon or mitigation is placed, exclusively, in the hands of the President. All other sentences can be pardoned or mitigated by the officer ordering the court, but

* Ex parte, Wells, 18 Howard U. S., p. 307.

† Opinions, May 10th, 1851. (U. S. *vs.* Wilson, 7 Peters, p. 158.)

admitting as they do of different degrees of severity, there arises no difficulty in regard to their mitigation, as this power can be exercised by lessening the quantity without changing the species.

But the power *to commute is* held to be *included in that of mitigation.* In the case of private William Barnsman, of the marine corps, who was sentenced to suffer death, the question, whether the President could change that sentence into one of "service and restraint for the space of one year, &c.," was submitted to Mr. Wirt, attorney-general. "The power of *pardoning the offence*, does not, in my opinion, include the power of changing the punishment, but the power to mitigate cannot be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court-martial. The only doubt that occurs to me as possible in regard to this construction, is, whether the power of mitigating a punishment includes the power of *changing* its species; whether it means any thing more than *lessening the quantity*, preserving nevertheless, the *species of the punishment.* A sentence of death cannot be mitigated in any other way than by changing the punishment. To deny him the exercise of this power in such a case, and to throw him on his own power of entire pardon, would be to compel him to extend the greatest mercy to those who had deserved it least; for while it is true that sentences of death are those which appeal most strongly to mercy, because they deal in blood, it is no less true that they are precisely those which are least worthy of an entire pardon, because they are pronounced only in cases of enormity. In other words, they are those in which the power of

mitigation applies with peculiar propriety. I think, therefore, that the President has the right to mitigate the sentence of death; and that every argument for the exercise of the power in inferior cases, applies *a fortiori* to such a sentence. And since a sentence of death can be mitigated only by changing it, my opinion is, that the President has the power, in the case of William Barnsman, to substitute the milder punishment which he contemplates."*

In the case of an officer of the navy who was sentenced by a court-martial to be dismissed the service, the President's power to mitigate the punishment, is upheld by the opinion of the attorney-general. "In any aspect of the case, I cannot doubt the power of the President to mitigate a sentence of dismission, by commuting it into a suspension for a term of years without pay. A dismission is a perpetual suspension without pay, and the limited suspension without pay is the inferior degree of the same punishment. According to the strictest authorities, I am satisfied that limited suspension, with the suspension of pay and emoluments, is a legal mitigation of a sentence of dismission from the service."†

In a subsequent opinion, the following is the language of the same attorney-general, Mr. Mason: "When an officer is brought to trial, and is sentenced to be punished, the executive may mitigate the severity of that punishment, but there is a guide—the discretion is a legal discretion, and the mitigation must not be according to a capricious will, but must have the sanction of the judgment of the court. It must inflict a part of the

* Opinions, January 4th, 1820. † Opinions, September 18th, 1845.

punishment awarded by the judgment of the court, with the exception of those cases in which there is no degree, as where the whole punishment must be inflicted, or no part of it can be. Such is the case with a sentence of death."*

In the case of Captain Ramsay of the Navy, who was, in 1843, sentenced by a general court-martial "to be suspended from all rank and command in the navy of the United States, for and during the period of five years," the President ordered that the sentence be "commuted to suspension for six months *without pay*." In reviewing the case, the attorney-general says, that "It does not appear that the commutation of the sentence was made at Captain R.'s request; or that the condition was accepted by him. The act of Congress has made a suspension of pay a punishment to be inflicted, or not, in a single class of cases, at the discretion of the court.† The executive has no power while an officer retains his commission, and is not sentenced by a court-martial to that effect, to take from him the pay which the law gives him. I am constrained to the opinion, therefore, that Captain R. is entitled to pay, during the period mentioned in the 4th auditor's letter, notwithstanding the terms in which the President commuted his sentence."‡

The weight of opinion is, therefore, in favor of the power of the President to *commute* under the authority given by law to mitigate; provided it be mitigation, and add nothing; and as this has also been affirmed by the Supreme Court as constitutional, and as flowing from

* Opinions, October 16th, 1845.

† See 84th article of war.

‡ Opinion, October 16th, 1845.

the pardoning power, the question is set at rest and is no longer open for discussion.

*The 89th article* prohibits "every officer" from pardoning or mitigating the sentence of death or of cashiering an officer. In *time of war* such a sentence can be carried into execution by the officer ordering the court-martial, except in the case of a general officer,* but the power of pardon and mitigation is left exclusively to the President.

In the case of Lieutenant Devlin of the Marines, on service with the army in Mexico, who was sentenced by a general court-martial, to be cashiered, the general-in-chief, after approving the sentence, directed that it should be commuted to twelve months' suspension from rank, command, and emoluments; without submitting the proceedings and his orders thereon, for the action of the President of the United States. The question as to the legality of the order of the general-in-chief, commuting the punishment, was submitted to the attorney-general.

"By the 65th article, the general-in-chief had the full power to confirm the sentence of cashiering against Lieutenant D. But he had no power whatever to pardon or mitigate the sentence, the 89th article expressly excepting the cashiering of an officer from his power to pardon or mitigate. All the authority he had was, to suspend the carrying the sentence into execution until the pleasure of the President could be known. The article is express, that, in the cases where the general-in-chief has authority to carry into execution such a sentence, to wit, in time of war, he shall not pardon or

* See 65th article of war, and act approved Dec. 24th, 1861.

mitigate, but may suspend execution and make report to the President."*

**Final Action on the Proceedings.** The proceedings of a court-martial having been finally disposed of by the officer ordering the court to assemble, or the commanding officer for the time being, are not liable to be reviewed by any other authority short of the President of the United States. A superior military commander to the officer confirming the proceedings may suspend the execution of the sentence when, in his judgment, it is void on the face of the proceedings, or when he sees a fit case for executive clemency. But such military commander is not invested by law with power to annul or pardon the sentence. As a legal judgment it so stands till vacated in due course of law. In such cases, the record, with his orders prohibiting the execution of the sentence, shall be transmitted for the final orders of the President. This salutary check on the action of the reviewing authority is made practicable by the regulations requiring all proceedings of the inferior courts to be transmitted without delay to the department headquarters; and the original proceedings of all general courts-martial after decision thereon of the reviewing authority, and copies of all orders confirming, or disapproving, or remitting the sentences of courts-martial, to be transmitted to the judge advocate of the army at the War Department.†

There is no court in which an *appeal* can be taken against the sentence of a court-martial, or in which it may be revised, with the single exception of the right of appeal from the judgment of a regimental to a gen-

* Opinions, September 20th, 1853. † G. R., p. 126.

eral court-martial, as provided by the 35th article of war.

The *successor* to an officer ordering a court-martial is empowered to act on its proceedings, confirming or disapproving them. He may also pardon or mitigate a sentence confirmed by his predecessor, but cannot review or annul his decision, nor arraign its propriety, or impugn the motives that induced it. That decision is final, and closes the trial, and the only remedy lies in the power of pardon or mitigation. As bearing on this point we quote the following: "The office and powers of the President are perpetual and every successor has all the powers which his predecessors had whilst in office. But this must be understood of matters executory, of things to be done, and not in relation to matters executed, rightfully and legally transacted. A decision made and executed under one President, is not liable to be reviewed and annulled under the administration of another."

**Remission.** Where an officer is suffering under a sentence of suspension from rank and pay, any order for duty and command according to his rank, issued by authority competent to pardon, is a remission of the unexpired portion of the sentence. In 1851, an officer of the navy was, by a court-martial, sentenced to be dismissed the service, which sentence was mitigated, by the President, to suspension from service and pay, for the term of twelve months. During said term of suspension, he was ordered by the secretary of the navy "to attend as a witness before a court of inquiry." The lieutenant claimed this as a constructive pardon of the entire sentence. Mr. Attorney-General Cushing denied

this claim, but stated that if the lieutenant "had been ordered on duty and command as a lieutenant, that would have been an *express* remission, not of the whole sentence, but of the unexecuted residue of the sentence."*

**Record Preserved.** The original proceedings and sentence of a general court-martial, shall be carefully kept and preserved in the office of the secretary of war, to the end that the persons entitled thereto may be enabled, upon application, to obtain copies thereof. The party tried by any general court-martial shall, upon demand thereof, made by himself, or by any person or persons in his behalf, be entitled to a copy of the sentence and proceedings of such court-martial.†

In this place it will be well to notice an important question, which has been largely discussed by De Hart in his work on courts-martial, and whose opinions find able advocacy in the views of the late general-in-chief of the army. The question is, *Has the* PRESIDENT *of the United States the right to* DISMISS *from the service*, WITHOUT TRIAL, A COMMISSIONED OFFICER *of the army or navy.* For arguments in denial of this right, we refer to the work of De Hart, and will confine ourselves to extracts from the opinions of high legal authority, delivered since its publication, in support of that right.

"The authority of the President in this respect (the removal of *civil* officers), was sustained in the debate of 1789 upon the ground that 'it resulted from the nature of the power, and the convenience and even necessity of its exercise; that it was clearly in its nature a part of the executive power, and was indispensable for a due

* Opinions, September 12th, 1854. † 90th article of war.

execution of the laws, and a regular administration of the public affairs.' This doctrine has since been expressly sanctioned by the unanimous sanction of the Supreme Court; placing it, however, more distinctly on the ground that, as a necessary rule, 'the power of removal is an incident of the power of appointment.' If there is any foundation in the constitution for any distinction in the tenure of civil and military office, it is remarkable that it should have been overlooked in the searching and comprehensive discussion of 1789. On the contrary, it was maintained that the power of removal extended to every officer of the government except the judiciary."*

And Attorney-General Cushing, December 10th, 1856, says: "As a question of law, and upon mere legal authorities, it must be taken as a point adjudged. So it is in the practice of the government. The power has been exercised in many cases with approbation, express or implied, of the Senate, and without challenge by any legislative act of Congress. In regard to officers of the army and navy, there is no specific provision in the constitution, of any sort. In regard to the appointment of the officers of the army and navy there is no general act of Congress. It stands, of course, upon the constitutional provision, that the President 'shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all other officers of the United States*, whose appointments are not herein otherwise provided for, and which shall be established by law.'

* Opinion Attorney-General Clifford, July 14th, 1847.

"Now, in regard to *civil* officers, the construction of the constitution was fixed, as all admit, past change, on occasion of the debates in the first Congress. And the established practice of the government on this point has passed into the state of equally established constitutional doctrine. The power to remove is inherent in the executive power to nominate.

"It is true the constitution contemplates the organization by Congress of a special forum for the trial of military officers; and officers of the army and navy may be dismissed by sentence of courts-martial. But that sentence must be approved by the President, in order to take effect; and even after such approval the party may be pardoned by the President. In these particulars the executive power of appointment and removal continues to be recognized by implication. It is not otherwise with civil officers. They are all subject to trial by a special forum, the Senate of the United States, whose judgment extends, by expression, not only to removal from office, but also to future disqualification, and is beyond the power of pardon. Surely, if the existence of a special statute forum for military officers be objection to the power of removal by the President in their case, still more so is the existence of the special constitutional forum in the case of civil officers.

"There are considerations of expediency, which have contributed to give greater practical permanency to military than to civil commissions. But these considerations cannot operate to change the signification of the constitution."

By the 11*th article of war*, it is enacted, that no discharge shall be given to a non-commissioned officer or

soldier before his term of service has expired, but by order of the President, the secretary of war, the commanding officer of a department, or the sentence of a general court-martial; nor shall a commissioned officer be discharged the service but by order of the President of the United States, or by sentence of a general court-martial.

It is certain that "*by order of the President*," applies as strictly to commissioned officers, as to non-commissioned officers and soldiers within the term of their enlistment. And yet, the constant practice of the army, sanctioned by regulation, is, to dismiss soldiers from the service with a "discharge in writing" on the application of their commanders, and without trial. As no exception has ever been taken to such procedure, under this article, the conclusion seems irresistible, that, under this same article, a commissioned officer may be dismissed or "discharged" by order of the President, and without a trial.

Much might be said on the ground of expediency, in opposition to the rule and practice in this regard, but we will only remark, that the power of the President to remove officers from the army at his pleasure, might some day prove of greater danger to the liberties of the people, than the simple fact of keeping up a standing army. The right of appointing to office during the recess of the Senate, said appointments to hold until the end of the next session of Congress, gives to an unscrupulous executive a fearful power. The selection of political tools, to hold such positions for many months, would suffice, under circumstances of great extremity, to work out direst evils to the republic. Such a power

over an army cannot be too well guarded by all the checks which an enlightened judgment can impose, and as an evil, is more to be dreaded than the perpetual tenure of officers' commissions, subject as they are to the close supervision of military tribunals.

## CHAPTER XIV.

## EXECUTION OF SENTENCE.

**Mode.** With regard to the mode of carrying the sentence into execution, it may be observed, that as one great end of punishment is the prevention of crime by example, it should be rendered, in this respect, as extensively useful as possible, by the publicity which attends its execution. Capital punishment, for instance, should be carried into effect in the presence of all the troops, or of such portion of the command as the convenience of the service may dictate.

**By Shooting.** In cases of capital punishment by shooting, great ceremony is ordinarily observed. The troops, to witness the execution, are formed on three sides of a square, each side formed in two lines, with an interval between the lines of twenty paces. The execution party consists of ten or twelve men and a sergeant, under the orders of the provost-marshal. The pieces will be loaded under the direction of the latter, out of sight of the firing party. He will see that one piece is loaded with a blank cartridge, and the remainder with ball cartridges, in the most careful manner. The procession will approach the line from the right, in the following order, viz.:

1. Provost-marshal.

2. Band of the prisoner's regiment, playing a funeral march.
3. Firing party.
4. Coffin, borne by four men.
5. Prisoner and Chaplain.
6. Escort.

When the procession shall have reached the right of the divison, the front battalions shall face to the rear, and the procession will pass between the lines of the battalions around to the left of the division. It will halt and form, facing outward, on the vacant side of the square. During its passage the bands of the regiments which it passes shall in succession play funeral marches, and after its passage each regiment in the front line will, in succession, face to the front.

On arriving at the open space, the music ceases; the prisoner is placed on the fatal spot marked by his coffin; the charge, finding and sentence of the court-martial, and the order for his execution are read to the culprit, and also, at the same time to each regiment by its adjutant; the chaplain having engaged in prayer with the condemned, retires; the execution party forms at six or eight paces from the prisoner, and receives the signal from the provost-marshal. If its fire does not prove instantaneously effectual, it is the duty of the provost-marshal to complete the sentence with his pistol. Sometimes the fire of a file or two is reserved, to be prepared for this painful occurrence. After the execution, the troops break into column by the right, and move past the corpse in slow time.

**By Hanging.** Death by hanging is witnessed by the troops formed in square on the gallows as a centre.

The executioner performs his office under the direction of the provost-marshal. The troops march off the ground in slow time; the provost-marshal with the escort remaining until the body is taken down.

**Drummed out.** Soldiers are sometimes ordered to be discharged with ignominy, in pursuance of the sentence of a court-martial, and the sentence is executed as follows: The troops being assembled, and the man about to be discharged brought forward in charge of a guard, the several crimes and irregularities of which he has been found guilty are recapitulated, and the order for his discharge is read, in which is noticed his ignominious conduct. The buttons, facings, and any other distinctions are then stripped from his clothing, and he is trumpeted or drummed out with the "rogue's march," through the barracks or camp of his corps.

**Corporeal** punishment is used, in the articles of war, to include confinements, ball, and chain, &c., to which an offender is subjected in his person.

A commanding officer is not justified in *releasing* soldiers under sentence of corporeal punishment, permitting them to do duty in presence of the enemy, or at other times, and afterward inflicting the punishment. Such a release is a remission of the unexpired portion of the sentence.

When a soldier is sentenced to *close confinement* in the cells, if sickness should require him to be removed to the hospital, he would, upon recovery of his health, be returned to imprisonment for the remainder of his sentence, but the time of his being in hospital must be counted a part of his imprisonment. When in hospital, he is deemed a prisoner.

**Place.** Courts-martial do not notice the *place* of imprisonment, in their sentence. This is left to the commanding officer under whose control the sentence is to be executed, and therefore the place of imprisonment may be changed should the removal of the garrison, or other cause, render it necessary. The time taken to effect the change would be counted in cases of ordinary confinement, but where confinement, either solitary, or on bread and water diet, is the sentence, the prescribed number of days must be fulfilled.

**Time.** In calculating the period of imprisonment, the day on which the sentence commences, and that on which the prisoner is to be released, are both to be counted; and it may also be mentioned, that in all cases, unless *calendar* months are specified, lunar months of twenty-eight days are always to be understood.

## CHAPTER XV.

## REDRESSING WRONGS, AND APPEALS.

**Protection to Inferiors.** The articles of war contain full authority for protecting the rights and interests of inferiors, by giving to all officers and soldiers the right of appeal, and requiring superiors, in positive and unequivocal terms, to follow certain prescribed modes for the doing justice to the appellant. While placing in the hands of the inferior the right to demand redress and to force a superior to act upon his complaint, the laws also give the superior an opportunity to redress the wrong, of his own motion and by his own act. In the case of a soldier it requires, without qualification or condition, a regimental court-martial to be summoned upon complaint being made, and with the reserved and absolute right to appeal to a general court-martial. In the case of wrongs, we thus see a palpable preference given to soldiers, by making an investigation immediately follow the complaint in the first instance, while with officers, an examination is only required after a refusal to grant redress, and upon an appeal from such refusal.

**Officers.** The 34*th article of war* enacts, that "If any officer shall think himself wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application being made to him, be refused redress, he may complain to the general commanding in

the state or territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into said complaint, and take proper measures for redressing the wrong complained of, and transmit, as soon as possible, to the Department of War, a true state of such complaint, with the proceedings had thereon."

This only refers to a wrong supposed to have been done by the colonel or commanding officer of the regiment, but the custom of service has extended its application to all wrongs implicating any superior officer, as the statute, being remedial and not penal, must receive an equitable and liberal interpretation, so as to attain most effectually the end in view, and prevent a failure of the remedy intended.

Following, however, the letter of the law, the aggrieved officer must first make due application for redress, to the colonel or commanding officer of the regiment. This must be made in writing, and the supposed aggressor allowed reasonable time to act upon the application by redressing the grievance, or returning the complaint with his refusal. Should he "be refused redress" either in express terms, or by such a neglect of the application as shall constructively amount to a denial of justice, he may then complain to the general commanding in the state or territory. This complaint must pass through the hands of the colonel, he being an intermediate commander, who has thus a second opportunity of acting upon it, and must be identical with the application submitted in the first instance. The general is required to examine into the complaint, and take proper measures for redressing the wrong, and no discretion is left him

in this regard, and in transmitting all proceedings had thereon, to the War Department. But if the charge laid be incapable of proof, or the grievance stated do not amount to a crime of military cognizance, it is usual to return the accusatory complaint to the party making it, with an admonition, or advice, that it be withdrawn. Should, however, the complainant insist that the statement of his grievances be brought to the notice of the department of war, the general is bound to forward it. Even his peremptory refusal to transmit it would not be prejudicial to the complainant, as the latter has the right, in that case, to address himself direct to the War Department through the adjutant-general's office.

**Non-Commissioned Officers and Soldiers.** The *35th article of war* enacts, that "If any inferior officer or soldier shall think himself wronged by his captain or other officer, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant, from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if, upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial."

Two questions present themselves: What "*wrongs*" are referred to? and, what is meant by "*his captain or other officer?*"

This article was originally adopted from the British article of war, by the revolutionary government, on the 20th of September, 1776, and was continued in force under the constitution until repealed and supplied by the

act of April 10th, 1806. Originally it read, "his captain or other officer commanding the troop, or company to which he belongs," and the evident intention of the change to "his captain, or other officer," was to extend the effect of the article to *all officers whatsoever*. Otherwise, how can we reconcile the suppression of the limitation with the remedial purposes of the article. Its object being remedial, the law is intended to cover, with its protection, all cases which might by possibility occur, and no limitation is placed to its power that the rights of the soldier might be held subservient to his own will, in every contingency. No evil, but much good, must of necessity be the obvious result, and there can be no reason why the most liberal interpretation should not be given it, if there be any doubt as to the extent of its operation. The British article has always been, and is still, expressly limited to cases arising between a soldier and his captain, or other officer commanding his troop or company, but that is no argument in favor of such a construction being placed on ours, but brings us to the conclusion that in making the change in its phraseology, our legislators desired to place no bounds to its beneficial effects and influences.

**Wrongs.** The construction has always obtained in the British service, that the wrongs referred to must relate to, what is commonly termed the interior economy of a company, and have reference to pay or allowances, clothing, messing, or the repair of arms and accoutrements, and must resolve itself into some claim not admitted by the soldier; and the British article of April 25th, 1860, confirms the above construction, by limiting it to cases in which he "shall think himself wronged,

in any matter affecting his pay or clothing, by his captain, &c." As long as our article was an exact transcript of the old British article, just so long their interpretation held good, but in extending its operation to all officers, the wrongs incurred could no longer be circumscribed within the narrow bounds of a company's interior economy. In our opinion, therefore, the law is applicable to every possible wrong inflicted by an officer on a soldier, when that wrong is capable of being redressed.

**Redress.** Upon complaint being made to the commanding officer of the regiment, he is required to summon a *regimental court-martial for the doing justice to the complainant.** This requirement is imperative and compulsory. Punishment forms no part of its office, as the supposed wrong-doer is a commissioned officer over whom a regimental court-martial has no jurisdiction, and upon whom it cannot sit in judgment. Neither can it be considered in the light of a court of inquiry, because these are prohibited unless directed by the President of the United States, or demanded by the accused. This court-martial is organized for special purposes, and the only authority given to it, is to decide on the justice or injustice of the complaint. Even an opinion pointing directly to the character of an officer cannot be given, it must be confined to the merits of the complaint, and simply state whether or not it be well founded, and to what extent. "To do '*justice to a complainant*,' and to sustain the majesty of a violated law, are two very different things. In the one case, a

* The British article of war, 13 (April 25th, 1860), says, "to summon a regimental court of inquiry, for the purpose of determining whether such complaint is just "

wrong may be remedied to the entire satisfaction of the complainant; but in cases of *a violation of law* by an officer, and where the majesty of the law is to be vindicated by the infliction of a penalty upon the aggressor, if a commissioned officer, a regimental court-martial should not be summoned, the trial of a commissioned officer by such court being prohibited by the 67th article of war; and an inquiry antecedent to a trial by a general court-martial would be a violation of a wise provision of the 92d article of war."*

The individual aggrieved must, in the first place, seek redress at the hands of the officer who has wronged him, and it is only when this redress is denied him, and he still thinks himself wronged, that he carries his complaint to the commanding officer of the regiment. This, though not required by the letter of the law, is strictly in consonance with the fixed rule for communicating with superiors; and besides, the supposed wrongdoer may at once do justice to the complainant, and obviate the necessity for further proceedings. Having received the complaint, the commanding officer of the regiment is compelled to summon a regimental court-martial for the doing justice to the complainant. If the alleged wrong be proved before the court-martial, its decision must be such as shall cause the wrong to be remedied. The decision being then adverse to the officer, it becomes the duty of the commanding officer of the regiment to see that the officer does justice to the complainant. If the officer refuse so to do, while he takes no appeal from the decision, his refusal becomes an offence, and he is liable to trial by a general court-

* G. O. No. 13, War Department, February 20th, 1843.

martial, for disobedience of the orders of the colonel, and for contempt of the decision of the regimental court.

**Appeal.** From the award of the court, either party, the soldier or the officer, may, if he thinks himself still aggrieved, appeal to a general court-martial. But if upon a second hearing, the appeal shall appear vexatious and groundless, the appellant shall be punished at the discretion of the said court. The absolute right of appeal is thereby given to either party. Should the decision be against the appellant, the court may state that the appeal did not appear vexatious, as in truth it need not of necessity be, for the appellant might have entertained an honest but erroneous view of the case. Should the appeal, however, bear palpable evidence of its vexatiousness or groundlessness, the court itself has power to award summary punishment.

This is the only case—the redressing of wrongs—in which an appeal can be made to a higher tribunal, under the articles of war; thus exhibiting special jealousy for the rights of inferior officers and soldiers, by making in their favor a marked exception to the ordinary course of military trials.

**Mode of Proceeding.** The *regimental court-martial* being assembled, and the parties present, the order convening the court is read, and both the appellant and defendant exercise the right of challenging any of the members. The court is then duly sworn. The complainant next makes a statement of his grievance, and proceeds to substantiate it by bringing in evidence, under oath, to prove the alleged wrong. The officer may then adduce any testimony he may have, in refutation or explanation, and make such statement as he

may deem necessary to his exculpation. All the evidence and explanations having been received and recorded, the court is closed for deliberation, and comes to a decision on the merits of the case. The proceedings are subject to the confirmation or disapproval of the officer ordering the court.

From this decision, should either party think himself still aggrieved, he may *appeal* to a *general court-martial*, by which the whole subject is again investigated. It is a new trial of the very same circumstances, and according to Blackstone "a new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict, and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion." The members of the regimental court can neither appear in court as defendants, nor take any part in the proceedings, nor can they be examined as to any point connected with the former trial. The appellant sustains the part of prosecutor, and the party in whose favor the inferior court has given its judgment is defendant in the cause; the complaint on the original trial being the matter in issue, on the truth or falsity of which the general court is to decide. Witnesses may be called by either party, whether they have been examined before the inferior court or not. "By consent of the parties the evidence at the former trial may be admitted."* Before neither of these courts does any one appear as a prisoner.

* Tytler, p. 336.

The court having assembled, the appellant and respondent being present, the order convening the court is read. The judge advocate then informs the court, that the case about to be investigated is an appeal from a regimental to a general court-martial, unless the object of the trial be embodied in the order for assembling. Both parties have the right of challenging. The court is then duly sworn. The statement of the appellant's alleged wrong is now read and recorded; after which he adduces evidence in support thereof. The appellant should not in any case be sworn. When the appellant's case is fully before the court, the respondent replies to it, by argument and such testimony as he considers necessary. He should not be sworn, unless required to be so by the appellant, or thought necessary by the court, that he *may depose to facts*. The examination of witnesses, who must all give their evidence on oath, is taken in precisely the same manner as on other courts-martial.

The trial being finished, the court deliberates on the evidence which has been adduced before it, and gives an opinion thereon. This opinion consists in the declaration that the decision of the regimental court-martial, from which the appellant has appealed, is, or is not, borne out by the evidence recorded on the proceedings. Should the court be further of opinion that the appeal is vexatious and groundless, such fact will be stated, and the court would proceed to sentence him at its discretion. It then remains for the reviewing authority to confirm or disapprove the proceedings and opinion of the court.

## CHAPTER XVI.

## COURTS OF INQUIRY.

A COURT of inquiry may be considered more a council than a court, which an officer in command may take advantage of to assist him in forming his judgment on any doubtful or intricate subject. It is sometimes called upon to receive and methodize information only; at other times, to give an opinion on any question or subject proposed.* In the British service there is no specific enactment for holding such courts, but the power seems to be an emanation from the prerogative of the crown, and to have been consecrated by custom as part of the military judicature.

**Authority to Convene.** For the army of the United States, courts of inquiry have been specially authorized by the 91st and 92d articles of war. The power to order them is therein strictly confined to the President of the United States, unless demanded by the accused. No one, therefore, but the executive can, of his own motion, order a court of inquiry. Upon application of the accused, all commanding officers have the undoubted power to order such courts, though the practice of the service, in cases of commissioned officers, has limited its exercise to those who can convene general courts-martial; and in the case of enlisted men to those officers who can assemble either of the inferior courts.

* Griffith's Notes, p. 133.

**Number of Members.** The court shall consist of one or more officers, not exceeding three, and a judge advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing.

**Jurisdiction.** Their jurisdiction only extends to an examination into the nature of any transaction, accusation, or imputation against any officer or soldier, but they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The order directing the court to assemble should contain instructions as to the extent of the investigation, and should also state whether or not the court is to report the facts merely, or give an opinion on the merits of the case. The court must conform strictly to these directions, either by giving a general opinion on the whole matter and whether further investigation and action are called for, or a statement of facts only, or these with an opinion thereon; its duties depending entirely on the instructions which the authority convening the court may think proper to give. Except when ordered by the President, the court cannot be directed to investigate other matters than those for which the officer or soldier has demanded the court, unless such incidental examination of particular points becomes necessary for a true understanding of the matter in issue.

**The Accused.** Although the accused cannot refuse to obey an order directing him to appear before a court of inquiry, convened for the purpose of inquiring into his conduct, he may object to take any part in the proceedings, and decline answering any questions which may, in his opinion, be prejudicial to his cause in the event of a trial. From the very language of the article, he

has, however, a positive right to be present at the examination, because "the parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in the question."

The **judge advocate,** as recorder, is the prosecutor in the case; the accuser may, however, be permitted to remain in court and make suggestions to the judge advocate. The court may allow the accuser to appear and prosecute the inquiry, as was done in the case of General Pillow, where the accuser was the prosecutor. The duty of the judge advocate, as recorder, is to reduce the proceedings and evidence to writing.

**Challenge.** It has been decided and is now an established principle, that members of a court of inquiry can be challenged, for cause, by either party. And this upon obvious grounds. The proceedings before such a court do not differ materially in character from a trial, except in the not finding and sentencing. The members, judge advocate, and witnesses are sworn, and the parties have the right of cross-examination. In giving their opinion, therefore, when such opinion is required, it is absolutely essential that the members should arrive at their conclusions after a candid and impartial investigation. The result may bear hard upon the accused in its effect upon public opinion, and the right of challenge, exercised solely for the benefit of the accused, and to attain impartial justice, should be permitted, subject of course to a wise discretion on the part of the court itself.

**Secrecy.** By reference to the *oath* prescribed for the members and the separate one for the judge advocate,*

* 93d article of war.

it will be seen that neither are bound to secrecy. The members are required to truly examine and inquire into the matter before them, according to the evidence; and the judge advocate to accurately and impartially record the proceedings of the court and the evidence given in the case. Custom has, however, fixed the practice not to disclose any portion of the proceedings, unless sanctioned so to do by the superior authority to whom the proceedings are submitted, because the expression of any opinion might prejudice the accused before the public, and may be of great injury to his cause in case of trial by court-martial.

**Witnesses.** Courts of Inquiry have the same power to summon witnesses as courts-martial.

**Counsel.** The parties before a Court of Inquiry—the accuser and the accused—may be allowed counsel.

The **hours of sitting** are not limited for courts of inquiry. The statute is also silent as to whether the court shall sit with *closed or open doors*, but the legal authorities are unanimous that it may be open or closed as the authority convening it shall prescribe. In other words, courts of inquiry are inherently closed courts, to which persons have access by permission and not of right. Where the authority ordering the court is silent on this point, the court decides at its discretion.

**Contempts** before courts of inquiry are as punishable as if committed before courts-martial. Officers may be placed in arrest, and soldiers be confined by its order.

The accused is not necessarily *in arrest*, when attending a court of inquiry.

**Record.** The 92d article prescribes that the proceedings of a court of inquiry must be authenticated by

the signature of the recorder and the president, and delivered to the convening authority, and the said proceedings may be admitted as evidence by a court-martial, in cases not capital, or extending to the dismission of an officer, provided that the circumstances are such that oral testimony cannot be obtained. The proceedings may be returned for revision, as in the case of courts-martial.

The accused cannot demand a copy of the proceedings, as the legal right is confined to the case of a *trial* before a *general* court-martial.*

**Statute of Limitation.** It was the opinion of the attorney-general that where there is no pertinent statute rule, a court of inquiry is to be governed by the general principles of military law, applying the analogies of a court-martial where those are applicable, and recurring to adjudged cases, precedents ruled, authoritative legal opinions and approved books of legal exposition.†

In his "Practice of Courts-Martial" General Macomb lays down the principle that "transactions may become the subject of investigation by courts of inquiry after a lapse of any number of years, on the application of the party accused, or by order of the President of the United States; the limitation mentioned in the 88th article being applicable only to general courts-martial."‡

De Hart does not accede to this doctrine, first, because of the doubts he entertains of the power of the President to dismiss an officer of the army. Had the President that power, a court of inquiry might be con-

* 90th article of war. † Opinions, Jan. 31st, 1857.

‡ Page 94.

sidered a favor by which an accused person may have an opportunity of justifying himself. "But the power of the President to dismiss officers being an established legal doctrine, the objection fails for want of premises."* Secondly, because of the inconvenience to officers whose conduct is the subject of inquiry, and of the possibility that this power may be abused in the hands of those in command. The generality of these objections constitutes their best refutation. There must necessarily enter into a proper discussion of the subject, much higher and broader considerations of the public service.

The great purpose of a court of inquiry is to collect information, by which to guide the discretion of him who orders it. The exercise of that discretion may lead to a court-martial, but not necessarily. The subject of inquiry may be so comprehensive that its relation to individuals may be of secondary consideration. It may involve matters of public welfare and of the general well-being of the service; and as to the exculpation of individuals, it is certain that the statute of limitation but ill performs that office; it wholly fails to satisfy the point of honor.

"It may happen that questions shall arise as to an offence alleged to have been committed by an officer more than two years ago, as to which he ought to be exculpated if innocent, or if guilty dismissed by the President, though not liable to be tried by court-martial. In such a case, a court of inquiry protects the officer, and informs the conscience of the executive.

A court of inquiry may be needed for the very purpose of ascertaining whether an alleged offence was or

* Opinions, Dec. 30th, 1853.

was not committed within two years, and so informing the mind and guiding the discretion of the executive on the very point of the legality of a court-martial.

In a word, courts of inquiry are not limited in the terms of the articles of war; it is well settled that they are not limited by construction in Great Britain; the more general conclusion has been the same in this country; and that conclusion seems to me consonant with the general principles of law, and especially convenient in a constitutional government like the United States."*

* Opinions, Dec. 30th, 1853.

## CHAPTER XVII.

## BOARDS FOR RETIRING DISABLED OFFICERS.

**Authority.** By the "Act Providing for the Better Organization of the Military Establishment," approved August 3d, 1861, it is enacted, that any commissioned officer of the army who shall have served as such forty consecutive years, may, upon his own application to the President of the United States, be placed upon the list of retired officers.* And it is further enacted, that if any commissioned officer of the army shall have become, or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list and withdrawn from active service and command, and from the line of promotion: provided that there shall not be on the retired list at any one time more than seven per centum of the whole number of officers of the army, as fixed by law.†

In order to carry out the provisions of this act, the secretary of war, under the direction and approval of the President of the United States, shall, from time to time, as occasion may require, assemble a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be of the medical staff; the board, except those taken from the medical staff, to be composed, as far as may be, of his seniors in rank.‡

* Section 15th. † Section 16th. ‡ Section 17th.

The **jurisdiction** of these boards extends to the determination of the facts as to the nature and occasion of the disability of such officers as appear disabled to perform military service. As it is solely by direction and approval of the President, that such boards are assembled, cases of officers can be brought to their cognizance by this same authority alone; and as a further protection to individuals where such vital interests as their positions in active service are in question, no officer shall be retired either partially or wholly from the service without having had a fair and full hearing before the board, if, upon due summons, he shall demand it.

These boards are invested by law with the powers of a court of inquiry and court-martial, and their decisions are made subject to like revision as that of said courts by the President of the United States. Whenever they find an officer incapacitated for active service, the statute requires them to report whether, in their judgment, the said incapacity resulted from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service.

The action of a board assimilates more nearly to that of a court of inquiry, as it is not a trial to vindicate the majesty of violated law, but a strict investigation of the facts in the case, with judgment thereon. In conducting the proceedings, therefore, the rules which govern courts of inquiry are closely applicable.

**Challenge.** The party whose case is before the board, has the same right to challenge as that of a prisoner before a court-martial. This follows directly from the spirit of the law, which gives him the right of a

*fair* and full hearing if he shall demand it. That a member entertaining feelings of malice toward the party concerned, should be excused from serving, is as necessary to impartial justice in such an investigation as on a trial before a court-martial. In the one case the accused is punished if convicted; in the other if judgment be adverse, the party loses his position in active service, and further still, is liable to one of three conditions of retirement, either of which will weigh most heavily upon an officer in a pecuniary point of view, in the nature of a fine of greater or less magnitude, according to the judgment of the board.

**Oath.** The statute provides "that the members of the board shall in every case be sworn to an honest and impartial discharge of their duties." The judge advocate is also sworn to record the proceedings of the board and the evidence in the case, accurately and impartially, for although this is not mentioned in the law, yet justice demands that the officer who keeps the record, examines witnesses, &c., and is, besides, the legal adviser of the board, should be forced to an honest discharge of his duties through the binding efficacy of an oath.

The board is not bound to secrecy, but, as in the case of a court of inquiry, its action should not be divulged until published by proper authority.

**Witnesses.** These boards have, equally with courts-martial, the power to summon witnesses, and decide upon the competency and admissibility of evidence, and the legal scope of the investigation in each particular case.

**Counsel.** The party concerned may be allowed counsel, on application to the board.

**Contempts.** Being invested with like powers as

courts-martial, contempts before them may be punished summarily; and officers of whatever grade may be arrested, and soldiers confined, by their order.

The party concerned is not in **arrest** when before the board, and he may, or may not appear before it, at his option.

The board sits with **open doors**, except when questions arise demanding its decision, which is always made with closed doors.

**Rights of the Party.** The party concerned has the right to cross-examine witnesses, and to call witnesses, and to offer argument.

**Decision.** The board closes for deliberation, and whenever it finds an officer incapacitated for active service, will report its judgment as to the cause of said incapacity. The proceedings of the board must then be authenticated by the signatures of the presiding officer and judge advocate, and transmitted to the secretary of war to be laid before the President of the United States for his action, the proceedings being, by law, made subject to his revision.

If it be the judgment of the board, approved by the President, that the said incapacity "results from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service," the disabled officer shall thereupon be placed upon the list of retired officers, with the pay proper of the highest rank held by him at the time of his retirement, and four rations per day. If, however, the judgment of the board, approved by the President, be that the said incapacity did not result from long and faithful service, &c., but otherwise, the

officer shall be retired as above, either with his pay proper alone, or with his service rations alone, at the discretion of the President, or he shall be wholly retired from the service, with one year's pay and allowances; and in this last case, his name shall be omitted from the army register.* The law has thus fixed, in terms, the action of the executive in any case that may arise.

**Revision.** Should the proceedings in any case, require further and more careful deliberation, the President may, at his discretion, send them back to the board for revision.

The party interested may demand a *copy of the proceedings*, as with courts-martial.

**Dress.** The officers partially retired shall be entitled to wear the uniform of their respective grades, shall continue to be borne upon the army register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles.†

**The statute of limitation** does not apply to boards for retiring disabled officers, and transactions running back through the officer's entire length of service, may become subject to investigation. The law states that the board shall determine facts as to the nature and *occasion* of the disability. The occasion may date back a number of years, and without the power to investigate matters that transpired at that period, the end for which the board is assembled would be signally defeated. In order to pass judgment understandingly, the board must not only be able to decide upon the fact of the present disability, but also as to the *cause*, remote though it be, of that disability.

* Section 17th. † Section 18th.

The board is dissolved by order of the secretary of war, under the direction and approval of the President.

**Record.** The record is kept after the style in courts-martial, as near as may be, opposite to each case recording the order, the day of meeting, the members present, whether the party concerned appeared, or declined to appear, being duly summoned; if present, whether or not he objected to any member named to the board, and then that the oath prescribed in the statute, "honestly and impartially to discharge their duties" as members of the board in this case, was duly taken by the members, &c.

**Evidence.** In regard to the following points as to the competency of evidence were decided by the board:

1. In a manifest and unmistakable case, the board may take the evidence of their own senses as to the physical condition of a party, who for instance, stands with into the room, or get up, or sit down without assistance. But generally, and in all questionable cases, they are to ascertain his condition, as to all judicial proceedings, by evidence.

2. That the conduct and services of an officer are evidence of his fitness to exercise his commission: and that the reports of courts of inquiry and the judgments of courts-martial are competent evidence in inquiring into such conduct and services; and that the whole record of such court shall be admitted, when required.

3. That facts, by the testimony of officers, and their judgment on such facts witnessed by them, are also competent evidence in the same inquiry.

4. That general professional reputation may also be given in evidence.

## CHAPTER XVIII.

## OF THE JUDGE ADVOCATE.

**Authority to Appoint.** By the act of Congress approved March 16th, 1802, it is enacted, "That whenever a general court-martial shall be ordered, the President of the United States may appoint some fit person to act as judge advocate, who shall be allowed, in addition to his other pay, one dollar and twenty-five cents for every day he shall be necessarily employed in the duties of the said court, and in cases where the President shall not have made such," &c. And by the 69th article of the rules and articles of war, it is provided that "The judge advocate, or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner the answer to which might tend to criminate himself; and administer to each member of the court, before they proceed upon any trial, the following oath," &c.

The power to appoint a judge advocate, or some person to officiate as such whenever a general court-martial is ordered and assembled, flows from the above quoted laws; and the practice, based upon their liberal inter-

pretation is, that the power to appoint some fit person to act as such, is coextensive with the power to convene a general court-martial. This power may be deputed to a commanding officer of a detachment or garrison, when the peculiar exigencies of the service demand it.

That the judge advocate should be a **military person,** is directly implied in the above article, where the "fit person" is compensated for his services by a specified allowance "in addition to his other pay," thus having direct reference to some person already in the employ of the government. The *deputy*, for whose appointment provision is made in the 69th article, must come under the same rule, if we take a liberal view of the two articles above quoted, in connection with the practice of armies in such cases. Furthermore, the responsibility of the individual exercising such vital and important functions in the administration of military justice, should be fixed beyond cavil, and as none but a military person would be amenable to military law, and subject to the military superior for the faithful performance of duty, so none but those subject to such authority should be permitted to assume such responsibilities.

The judge advocate must be a **fit person,** whose presence, duly appointed by authority, is essential to the jurisdiction of a general court-martial; who is the legal adviser of the court; the *primum mobile* of a court-martial, as McArthur says, not only impelling it to action, but on whom in a great measure depends that harmony of motion so necessary to constitute a regular court. It is very evident that in the prosecution of crimes before a special tribunal erected for special purposes, a thorough knowledge of the laws enacted for their govern-

ment, and of the practice in similar cases, is most essential, and such information cannot be found outside of the army, nor the want of it compensated by any fund of legal lore. Sir Charles J. Napier truly observes, that no one should hold this appointment till after undergoing a strict examination as to his knowledge of military and criminal law, and the practice of military courts. But whatever be his qualifications, he should, when conducting the proceedings of a court-martial, be impressed with the facts; that justice is the object for which a court-martial is convened and the judge advocate appointed; that the great principle of a military court is honor; a conscientious adherence to substantial justice; that the business of courts-martial is, not to discuss points of law but to get at the truth by all the means in their power; and that a judge advocate is the main spring of a court-martial; that on him the court depends for information concerning the *legality* as well as the *regularity* of its proceedings; and if he *errs* all may go wrong.*

Besides a perfect familiarity with the rules and articles of war, the general regulations of the army, and the orders bearing on the subject and issued by competent authority, he should have recourse to the standard works on military law and the practice of courts-martial, for information on the many points not fixed by authority.

**Prosecutor.** By statute the judge advocate is the official prosecutor of the United States, and when the military accuser is permitted to be present, it is not as a prosecutor, but only as adviser or assistant to the

* Hughes' Duties of Judge Advocate, p. 15.

former, that his influence in the case pending can be felt. No officious interference on his part would be tolerated, but his advice ought to be given privately to the judge advocate. After the prisoner has made his plea, it is made the duty of the judge advocate, so far to identify himself with the interests of the prisoner, as to object to any leading questions to any of the witnesses, and to any questions to the accused the answers to which might tend to criminate himself. This duty he is to perform whether or not the accused has counsel to assist him in the defence. The object of the court is not the conviction of the prisoner, as a necessity, but the arriving at the truth, that there may not, in any case, be a failure of justice, and justice does not mean a conviction rather than an acquittal.

While a judge advocate should never omit any thing which may be of service to the prisoner, neither should he permit a criminal to escape punishment through any leniency in the conduct of the trial. His course should be thoroughly impartial, his every effort being directed to the attainment of truth. "*Truth and equity* should be most conspicuously seen at all courts-martial, but chicanery never permitted to enter the door."*

The law expressly states to what extent the judge advocate shall be **counsel for the prisoner,** and as the constitution allows to an accused person the assistance of counsel in his defence, in all criminal prosecutions, the duty of the judge advocate as such is restricted to the words of the law, as indeed it must be from the very nature of the case, as he cannot possibly perform both duties—prosecutor and counsel—at the same time.

* Kennedy.

The practice has, however, been for the judge advocate to interfere to the extent to which the court itself is bound to interpose; to take care that the prisoner shall not suffer from a want of knowledge of the law, or from a deficiency in experience or of ability to elicit from witnesses, or to develop by the testimony a full statement of the facts as bearing on the defence.

In court the judge advocate can go no farther in his assistance, but out of court his advice should be freely given when required, and every assistance extended to the accused which is not incompatible with the honest discharge of his duties as the public prosecutor. High authority has emphatically denounced such a practice, on the ground that the judge advocate, being both prosecutor and counsel for the prisoner, can, nine times out of ten, make the latter appear innocent or guilty at his pleasure: he is like a man playing a game of chess with himself, he can cause either the red or the white side to win.* In the exercise of the functions of his office as counsel he should, therefore, caution the accused not to divulge his line of defence, or the nature of the testimony he intends eliciting from his witnesses, and confine his advice to generalities that while evolving no essential points that are to be made in the defence, will inform the accused as to the best manner in which to conduct it, and the points essential to be proved in order to insure an acquittal.

**Counsel.** As it is a positive right of the prisoner to have counsel to assist him, so it is admitted that the judge advocate may also be assisted by such; but, as in the case of counsel for the defence, he can take no fur-

* Sir C. J. Napier.

ther part in the proceedings than by advising the judge advocate upon such points as may demand his attention. This counsel must be admitted, solely on the part of the United States, in whose name the prosecution is urged, and cannot under any circumstances be admitted at the instance of individuals interested in the result of the trial Pending the trial of Commander Mackenzie, of the navy, charged with *murder on board a United States vessel on the high seas*, an application was made by two legal gentlemen, stating "that they had been employed by the relatives of one of the persons, for the murder of whom Commander Mackenzie was then on trial; to attend the trial and take part therein, by examining and cross-examining the witnesses who might be produced, and propounding such questions, and offering such suggestions in relation to the proceedings &c., as they might deem necessary." The court, after mature deliberation, decided that the application could not be granted.*

**Rules of Procedure.** There are no statutory provisions regulating the manner in which military prosecutions are to be conducted, and therefore, in all cases in which forms or rules of proceeding before courts-martial have been neither established by law, nor fixed by the custom of service, the procedure must be in accordance with the practice which governs criminal trials in the ordinary courts of law.

**Charges.** The judge advocate being furnished with the charges and specifications on which he has to prosecute, must, from the information given him by the accuser, instruct himself in all the circumstances of the case, and the evidence by which the whole particulars

* Trial, pp. 8, 9.

are to be proved against the prisoner. Where the task is delegated to him of arranging a prosecution on grounds defined for him by higher authority, it is strictly his duty to inquire what persons have knowledge of the facts in issue, and to what particulars each of these can bear testimony, so that he may not necessarily waste the time of the court by adducing witnesses who may be unable to furnish any information.

**Summoning Witnesses.** Having ascertained what witnesses will be necessary both for the prosecution and defence, the judge advocate summons them all, and this is done at the earliest practicable moment, to avoid any delay in the conduct of the trial; but with this limitation, that he shall not summon any witness at the expense of the United States, nor any officer of the army, without the order of the court, unless satisfied that his testimony is material and necessary to the ends of justice.* There is no specific form of summons to witnesses laid down either by law or regulation, but it is essential, in whatever terms prepared, that it be drawn up with care and precision.

**Duties.** A judge advocate appears at a court-martial, in three distinct characters; *first*, As an officer of the court, for the purpose of recording its proceedings, and administering the regular oaths; *second*, as the adviser of the court in matters of form and law; *third*, as public prosecutor. In the first of these characters he is, of course, subject to the orders of the court, who may direct their proceedings to be conducted and recorded in any manner which they think proper; but in the other two characters, the court can exercise no con-

* Revised regulations, p. 125.

trol whatever over him, as in the performance of those duties he must be allowed to act according to his own judgment and discretion.*

**Record.** The record of the court shall be clear and legibly written; as far as practicable without erasures or interlineations. The pages to be numbered, with a margin of one inch on the left side of each page, and at the top of the odd and bottom of the even pages; through this last margin the sheets to be stitched together; the documents accompanying the proceedings to be noted and marked in such manner as to afford easy reference.† It is a good rule that all *written* evidence which tends to prove the charge ought to be recorded in the place where it directly applies, but such documents as are only introduced for explanation or illustration, should be annexed to the record as an appendix.

In the interval between the adjournment on one day and the next meeting of the court, it is the duty of the judge advocate to make a fair copy of the proceedings. This he continues to do to the conclusion of the trial. At the meeting of the court he submits the *fair copy* of the last day's proceedings to the presiding officer, who either examines it himself, or requests a member to do so, while the judge advocate reads over in open court, in presence of the accused, the record he took of the previous day's proceedings. The court may dispense with the reading, but it is highly desirable that it should be read, that errors and omissions in the fair copy may be corrected, and the evidence be more deeply impressed on the minds of the members.

* Kennedy. † Revised regulations, p. 125.

**Reply.** After the accused has closed the defence, the judge advocate has the undoubted *right of reply.* This right holds, where the prisoner has examined witnesses, or introduced documentary evidence, or has in his address opened new facts upon his own assertion, or upon documents which he may read though not proved in evidence. Where a reply is desired, the court will always grant the judge advocate a reasonable time for its preparation.

Tytler observes, that in *complicated* cases, in circumstantial proof, in cases where the evidence is contradictory, it is expedient that the judge advocate should arrange and methodize the body of the evidence, applying it distinctly to the facts of the charge (specification) and bringing home to the prisoner the result of the proof against him, balanced with the evidence of exculpation or alleviation. In ordinary cases, a charge of this kind is not so necessary.

Besides applying the evidence fairly to each side of the question, the judge advocate should inform the court as to the legal bearing of the evidence; for it may be that the evidence shall morally satisfy the minds of the court and still may be deficient *legally.* He should not assume facts to be proved, *that* should be left to the decision of the court; he should show the relative bearing of the entire evidence, but should give no opinion. The members, and they alone, are, by their oaths, to determine according to the evidence.

**Control over Judge Advocate.** The court can exercise no control over the judge advocate in matters of form and law. It is his duty to instruct and counsel the court in matters of necessary form, and to explain such

points of law as may arise during the proceedings, and his own discretion must be his guide in determining when such a course may be seasonable or necessary.

**His Opinion.** Whenever his opinion is demanded by the court, he is bound to give it freely and candidly, and even when not demanded, it is his duty in every case to caution the court against any violation of material justice, and if his counsel be disregarded, his opinion must be recorded at length in the proceedings, together with the action of the court thereon. This is necessary, that the reviewing authority may have a full and complete record of all that transpired upon the trial, for his information and guidance, and that the judge advocate may stand absolved from all imputations of failure in his duty of giving counsel, and the error or wrong committed, be chargeable to the proper source.

De Hart says: "It thus seems to be a well-settled point, that whenever any thing occurs in the progress of a trial, which calls for the declaration of an opinion of the judge advocate, it is proper that such opinion should be entered on the record." Whenever the court, refuses to adopt the opinions of the judge advocate involving important points of law bearing upon the case the grounds upon which their decision rests should also be recorded.

When the court is cleared for deliberation on the finding and sentence, the duty of the judge advocate is merely that of recorder, and he abstains from intimating, in any manner, his judgment as to the guilt or innocence of the accused. If, at this stage of the proceedings, his opinion be asked, it shall be given, or should he notice

any irregularity or illegality in the finding or any deviation from the letter of the law in passing sentence, it is clearly his duty to point out the error.

**Proceedings.** The court having concluded its labors, the record of the proceedings must be authenticated by the signatures of the president and judge advocate, who shall also certify, in like manner, the sentence pronounced by the court in each case.

The judge advocate shall transmit the proceedings, without delay, to the officer having authority to confirm the sentence, who shall state, at the end of the proceedings in each case, his decision and orders thereon.

The original proceedings of all general courts-martial, after the decision on them of the reviewing authority, and all proceedings that require the decision of the President, under the 65th and 89th articles of war, and copies of all orders confirming or disapproving, or remitting the sentences of courts-martial, and all official communications for the judge advocate of the army, will be addressed to "*The Adjutant-General of the Army, War Department*," marked on the cover, "*Judge Advocate.*"*

The proceedings of garrison and regimental courts-martial will be transmitted without delay by the garrison or regimental commander, to the department headquarters for the supervision of the department commander.

By the *original* proceedings is meant the *fair copy*, which has been daily submitted for the inspection of the court, and has been corrected in its presence.

**Time of Attendance.** The certificate of the judge

* Revised regulations, p. 126, and 90th article of war.

advocate shall be evidence of the time of attendance on the court of the members and witnesses, and of the time he himself was necessarily employed in the duty of the court. Of the time occupied in travelling, each officer will make his own certificate.

**Before Courts of Inquiry.** The specified duties of a judge advocate before a court of inquiry, are, "as a recorder, to reduce the proceedings and evidence to writing;"—in conjunction with the president to authenticate the proceedings by his signature;—to administer an oath to the members; and himself to swear that he will "accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing." He also administers to the witnesses the same oath that is taken before a court-martial. He summons all witnesses required for the investigation of the circumstances, regarding which the court is assembled, and gives notice to the party interested of the time and place of meeting.

**The object of the court** being mainly to gather and methodize information, so as to enable the convening authority to arrive at correct conclusions, it becomes the duty of the judge advocate to examine the witnesses, and lend his exertions to attain that object, by a searching and scrutinizing inquiry into the minutiæ of the subject ordered to be investigated, so that the entire circumstances of the case may be laid before the convening authority in a clear and explicit form.

As the proceedings of a court of inquiry, by having the witnesses sworn, partake of a judicial character, the judge advocate must be considered as a **legal adviser** to the court, and he is therefore bound to see that no im-

proper evidence is admitted, and to put the court on their guard against the commission of legal errors.*

**Mode of Proceeding.** The court having convened, the judge advocate shall, in presence of the accused, if any, read the order constituting the court, and will then ask the accused if he has any objections to any of the members, which question with the answer must be recorded.

The court is then *sworn* by the judge advocate, and the latter is sworn by the presiding officer.

The judge advocate now reads any *special instructions* that may have been given to the court for their guidance and government, and this act will also be recorded.

The court having decided, with closed doors, upon the *best mode* of procedure, the doors are opened and the parties recalled. The *witnesses* are next examined, and their evidence taken down in the same manner and order as is observed on trials by courts-martial; and a *fair copy* of the proceedings made from day to day, which is read over and corrected at their next meeting.

The business of the court having been concluded, the record of the proceedings will be *authenticated* by the signatures of the president and judge advocate, and be transmitted by the latter to the authority ordering the court.

* De Hart, p. 332.

## CHAPTER XIX.

## REMARKS ON ARTICLES OF WAR.

**Mutiny or Sedition.** "Art. 7. Any officer or soldier who shall begin, excite, cause, or join in any mutiny or sedition in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

"Art. 8. Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or coming to the knowledge of any intended mutiny, does not, without delay, give information thereof to his commanding officer, shall be punished by the sentence of a court-martial with death, or otherwise, according to the nature of his offence.

"Art. 9. Any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court-martial."

By *muting* is understood resistance to lawful military authority: this resistance may be either active or pas-

sive. It implies not only extreme insubordination, as individually resisting by force, or collectively rising against or opposing military authority, but a murmuring or muttering against the exercise of authority, tending to create disquiet and dissatisfaction in the army. It is not, therefore, necessarily an aggregate offence committed by many individuals, or by more than one. "It may originate and conclude with a single person; and be as complete with one actor in it, as one thousand."*

By *sedition* is meant resistance to the government or civil authorities, necessarily involving, or resulting in insubordination to military authority.

The crime of mutiny or sedition must be proved by acts, or by words in connection with acts, for no one can be convicted of having begun, excited, caused, or joined in any mutiny or sedition, unless it be proved that said crime was actually committed.

The act of *beginning* any mutiny is an overt act, and the direct employment of force against authority, as where a private soldier, when on guard duty, stabs with a bayonet the officer commanding the said guard; the *exciting* to any mutiny, though it may not insure the completion of the act intended, is still an act of mutiny, as where an officer endeavors by words or gestures to dissuade the men from doing a duty they are ordered to perform; the *causing* any mutiny, by agitating the propriety or impropriety of the measures of their superiors, —such conduct tending to create discontent among the soldiers; the *joining* in any mutiny, as where soldiers join, actively, in any act of insubordination or mutiny,

* Samuel, p. 257.

or, passively, do not use their utmost endeavors to suppress the same, or coming to the knowledge of any intended mutiny, do not at once give information thereof to their commanding officer.

**Striking a Superior Officer, being in the Execution of his Office.** That the violence offered to a superior must be while in the *execution* of his office, is fixed as an inseparable part of the offence, and must be proved, in order to subject the accused to the severe penalty contemplated by the article. To be in the execution of his office does not necessarily require the officer, or non-commissioned officer, to be in the actual performance of a prescribed duty, as parade, drill, or guard, for whatever the law, regulations, or custom of service require of him, that it is his duty to perform, and while so employed he is in the execution of his office and entitled to the protection of the law.

To constitute the offence, it must appear that the offender was aware of the rank or superiority of the superior. An officer may be in the execution of his office in plain clothes, and to prove the crime in such a case would necessitate the proof, that the offender, at the time, was aware that his violence was directed toward his superior officer.* When the charge is thus fully made out by evidence, the mere act of drawing or lifting up a weapon against a superior, *is mutiny*, and punishable by death at the discretion of the court.

It may be well to remark, that **mutinous conduct** is not one of the nominated offences in the articles of war, and cannot be prosecuted under either of the three mutiny articles above quoted. It can only be taken cogni-

*Simmons, p. 298.

zance of by a court-martial, when, in terms of the general article, it is further described in the charge, "to the prejudice of good order and military discipline."

**Disobeying any Lawful Command of his Superior Officer.** Disobedience of orders is reckoned among the gravest military crimes, and as such is made a penal offence by the 9th article. A refusal to obey *any* order is undoubtedly mutiny, although a failure or refusal to obey one, or two, or any number, more or less, of special orders for reasons in each case, may be consistent with a general submission to military authority, and may argue no intent to resist or subvert it.

It was announced in orders, by direction of the general-in-chief, that under the 9th and 67th articles, the jurisdiction of the inferior courts-martial does not extend to cases where the offence is specifically charged as "disobedience of orders." The following decision upon the same point, was subsequently made by the secretary of war. "The question is not clear upon the authority of the text writers. But I incline to the opinion of the general-in-chief. Certainly, if 'disobedience of orders' means 'disobedience of a lawful command of a superior officer in the execution of his office,' it is a 'capital case,' and not triable by a garrison court, and however that may be, the order of the general-in-chief is mandatory to garrison commanders, and does, in effect, forbid any such commander to send any such case to a garrison court, or to execute their sentence in such case."*

**Challenges.** "Art. 25. No officer or soldier shall send a challenge to another officer or soldier, to fight a

* G. O., War Department, November 1st, 1858.

duel, or accept a challenge if sent, upon pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment, at the discretion of a court-martial.

"Art. 28. Any officer or soldier who shall upbraid another for refusing a challenge, shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept of challenges, as they will only have acted in obedience to the laws, and done their duty as good soldiers who subject themselves to discipline."

In a recent case, Colonel S. was brought to trial before a general court-martial, charged with violation of the above-quoted articles of war.

1st. In sending a challenge to General H. to fight a duel, in words as follows:

"WASHINGTON, D. C., *February* 15, 1858.

"SIR: As more than twenty-four hours have passed, since my note to you of yesterday, I have a right to presume that you do not intend to answer it; I have therefore to invite you to leave this city with me tomorrow morning, to go to any place you may designate. I send this note privately to avoid committing any friend as long as possible. An early answer is requested.

"I am, with due respect,

"E. V. S——,

"*Col. 1st Cavalry.*

"Brevet Brig.-Gen. W. S. H——,

"*Col. 2d Dragoons.*"

2d. In upbraiding General H. for refusing to fight a duel, in words as follows:

"WASHINGTON, D. C., *February*, 16, 1858.

"SIR: I received with great surprise your note of last evening, and have only to say to you; that a man who could insult a brother officer from an official covert, and afterwards refuse to apologize, or to give him that satisfaction which he had a right to demand, is utterly unworthy of any farther notice from me.

"I am, &c.,

"E. V. S——,

"Brevet Brig. Gen. W. S. H—— "*Col. 1st Cavalry.*

"*Col. 2d Dragoons.*"

The verdict of the court was an acquittal of both charges and their specifications.

The secretary of war, reviewing the proceedings, says:

"Colonel S——'s note of the 15th February is a challenge within the meaning of the article of war. The military authorities, and the decisions of courts-martial are clear in this regard. They lay down, what is indeed the necessary doctrine to give effect to the law, that '*no particular phraseology, no set form is necessary to a challenge;*' nor '*a formal invitation to fight;*' but '*a mere hint or suggestion*' is sufficient, and even '*such a defiance as casts the burden on the other party.*' As challenges are in violation of law, ingenuity is not uncommonly exercised to avoid a plain expression of their purpose. But these are artifices to defeat the law, which courts of law will never favor. And when the meaning

is so clear as to be intelligible to the party who receives the challenge, it answers its purpose, and is intelligible to the tribunal which tries it. In this case, however, the challenge is plainly expressed; even if it were not conclusively interpreted by the rest of the correspondence, and expressly as '*a demand of satisfaction.*'

"The doctrine of the findings in this case, would render the article of war void and inoperative, by indicating a mode of doing without breach of the law what it is the exact purpose of the law to forbid.

"A rigid enforcement of strict discipline in the army is the most essential requisite for its honor and efficiency. If the bonds of discipline are loosened, it is only a question of time when the army will become a mob, and public opinion will ascribe to it that character, even before it would be fairly entitled to it."*

**Offences against Citizens, &c.** "Art. 32. Everyofficer commanding in quarters, garrisons, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders, which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, or disturbing fairs or markets, or of committing any kind of riots, to the disquieting of the citizens of the United States, he, the said commander, who shall refuse or omit to see justice done to the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be cashiered, or otherwise punished, as a general court-martial shall direct.

* G. O. No. 2, War Department. March 16th, 1858.

"Art. 33. When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company, to which the person or persons so accused shall belong, are hereby required, upon application duly made by, or in behalf of the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect, or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

The 32d article authorizes and requires every commanding officer to redress all abuses or disorders which may be committed by any officer or soldier of his command, to the disquieting of the citizens of the United States.

By the 33d article, it is made a condition precedent to his being delivered up, that the person called for shall be accused of some offence such as is "punishable by the known laws of the land." To the men under his command, so long as they continue to discharge their duties, the superior owes a duty of protection, which is first in point of time and highest in obligation, and he

has no right to withdraw it except as specified in the article. A mere demand based upon the fact that an offence has been committed against the person or property of a citizen, is not sufficient. The offence must be specified, and it is his duty to satisfy himself by a careful scrutiny of the circumstances, that the offence is one contemplated by the article. He should be furnished with the specific charge, and the name of the injured party; and an affidavit should accompany the demand, giving all the information necessary to a full comprehension of the case.

The application must be made "by, or in behalf of the party or parties injured." In the case of murder, the party injured cannot act. In his behalf, or in that of the society injured in his person, it is the right of any and every citizen to move the courts of the country to apply the laws of the land to the criminal, and a commanding officer would scarcely hesitate, in such case, to surrender the accused to the civil authorities.

Under the supposition that the act is internal to the army, as that an officer on duty kills a superior officer, the act, though mutiny by military law, would be murder by the ordinary law, and as such be triable by a civil court. "There the whole society is a party injured, and the public prosecutor may justly demand that the criminal shall be held amenable to the aggrieved majesty of the law of the land, either with or without a technical conformity of proceeding to the letter of the articles of war."*

**Embezzlement.** Art. 39. Every officer, who shall be convicted before a court-martial, of having embezzled,

* Opinions, April 7th, 1854.

or misapplied, any money with which he may have been intrusted, for the payment of the men under his command, or for enlisting men into the service, or for other purposes, if a commissioned officer, shall be cashiered, and compelled to refund the money; if a non-commissioned officer, shall be reduced to the ranks, be put under stoppages until the money be made good, and suffer such corporeal punishment as such court-martial shall direct.

In the case of Captain T. J. who was tried before a general court-martial, on the charge of "*embezzlement of public money intrusted to him*," the court found him guilty of portions of each of the first two specifications, but attached no criminality thereto, and therefore acquitted him of the charge.

The following were the orders thereon from the War Department.*

"The verdict of the 1st and 2d specifications to the 1st charge does not express the meaning of the court. For surely a court sworn to administer the law cannot mean to return a verdict which is a pure and simple contradiction of the law. The court cannot have meant to declare that it is not embezzlement to render a false voucher for payment of money not paid when the law declares that it is embezzlement. The court must therefore have meant that the accused is not guilty of the facts charged in the legal sense; that he did not wilfully and designedly render a false voucher. That this is what the verdict meant would also appear from the ruling on the plea in bar, and from the evidence on the record to the facts. The accused pleaded, with other

* G. O. No. 1. War Department, January 18th, 1861.

matters in bar, that the act of Congress of August 6, 1846, defining embezzlement, is the law in the trial of indictments in the civil courts of the United States, but is not the law of embezzlement in their courts-martial. The court, properly, overruled the plea. And it is in place here to remark, that the rendering of false vouchers was always evidence of embezzlement at common law, and the effect of the recent statute, upon that point, is merely to relieve the prosecution of the necessity of ascertaining the exact amount overcharged and embezzled by making any overcharge an embezzlement of the whole amount of the voucher. The evidence on the record which also goes to explain the verdict, is this: testimony for the defence was brought to show that the accused gave his clerk for the claimant a check for $2,000, and that the account was made up by the clerk and receipted by the claimant for a larger amount than paid without the knowledge of the accused. If this evidence satisfied the court, they ought to have rendered a general verdict of not guilty; or a special verdict explaining the facts in their legal relation, and not the verdict they have rendered, finding the facts as charged, and rejecting and denying the necessary and legal conclusion from them.

"The record discloses very extraordinary errors in the proceedings. The prosecution offered in evidence the receipts designated in the specification to the 2d charge, to which the defence objected 'on the ground that they were part of, and attached to the proceedings of the court of inquiry," and the court sustained the objection. The prosecution then offered parole evidence of their contents; the defence objected, and the court overruled

the objection. In these decisions the court contrived to violate the plainest rules of evidence. It is really unaccountable how a court could conceive that evidence, documentary or oral, should be rejected in one court because it had been admitted in another court, or that a document being incompetent, its contents by parole could be admitted.

"Again; the voucher for $2,452.70 alleged to be overcharged being in proof for the prosecution, and for the defence that $2,000 had been paid, the prosecution asked *what part* of that payment was on account of that voucher. The defence objected. That the inquiry was pertinent, that it went precisely to the gist of the matter on trial, would seem to be obvious; and, moreover, the prosecution explained, that the claimant had, in fact, signed other vouchers, and the point was how much had been paid on that voucher. Nevertheless the court sustained the objection and ruled out the inquiry. Then the prosecution asked if *the whole of the* $2,000 *was paid on that voucher.* The defence objected (what was clear enough), that that was matter just ruled out. But now the court overrule the objection and admit the answer, and allow it to be shown that '*the whole*' of the $2,000 was not paid on that voucher, though they would not allow it to be shown '*what part*' of it was so paid; and consequently what part of the voucher had been paid, and that material inquiry they left as much in the dark as they found it.

"Errors such as these are inexcusable.

"This record presents, however, a much more important subject for the animadversion of the department and the information of the army. This accused and some

other disbursing officers have been charged with rendering vouchers of payment, when, in fact, the payments had not been made. Their defence is, that having no public money, they had given the public creditor, for indispensable supplies or services, certificates of public debt, or pledged their personal credit, and then took his receipt to draw the money on it and apply it according to the liabilities so incurred. It is sufficient to say that the law positively forbids such vouchers; that it makes it felony to render a voucher of money paid when it is not paid; that the proper mode of drawing public money for disbursements is by requisition and not on false vouchers; and that the department can accept no excuse for a practice which, with whatever good intentions, is forbid by law, and tends to discredit all public accounts."

**Drunk on Duty.** "Art. 45. Any commissioned officer who shall be found drunk on his guard, party, or other duty, shall be cashiered. Any non-commissioned officer or soldier so offending shall suffer such corporeal punishment as shall be inflicted by the sentence of a court-martial."

The following was the decision of the War Department in the cases of Captain S. and Lieutenant M., who were tried on the charge of "*Drunkenness on duty.*"

"These cases raise the question whether the parties on trial were on duty in the sense of the 45th article of war. In one sense, 'on duty' is in contradistinction to 'on leave of absence.' But the expression appears to have a narrower meaning in the 45th article of war. The old law in this matter ran in these words: 'guard, party, or other duty under arms.' The omission of the

words 'under arms' from the present law, with intention to include all descriptions and circumstances of duty, yet still leaves excepted those other occasions in camp or garrison, when the officer is, in the ordinary language of service, 'off duty.' It is unnecessary to add that drunkenness off duty, according to the circumstances, may be cognizable by a court-martial, but not under the 45th article of war. What then are the conditions which bring the offence under this article? It is difficult to make a general definition which shall be precise and accurate. The law leaves it, as other general words of statutes, to judicial interpretation in the particular case. In one of these cases the court find that an officer, drunk at a dancing party, when engaged in no act of duty, and called on for the performance of no duty, was drunk on duty, because it was during his tour as officer of the day, and the same court find, in the other case, that an officer is not drunk on duty, when being sent to execute a duty requiring his attention from day to day, he gets drunk after he has commenced it, and is thus rendered unable to continue it; or, when having received an urgent and peremptory order, calling for immediate execution, he is unable to execute it, because of his drunkenness. The department holds that all these are cases of drunkenness on duty."*

And in a subsequent case the following were the orders thereon:

"The court suggest no explanation of the distinction they take that the accused was '*drunk in the actual execution of his office*,' but not '*drunk on duty*' in the meaning of the article of war. The department cannot

* G. O. No. 7, War Department, June 18th, 1856.

discover any just ground for the distinction, which is even expressed by a contradiction. The article of war must be taken to use its words in their plain meaning. If it be the idea of the court, that because certain duties are specified in the article, its purview is limited to those and like duties, they impose a restriction on the general words that follow the specification, which the words themselves do not carry, and which is inconsistent with the policy and history of the statute. If by specifying 'guard or party,' only like duties of special detail are meant, the law is greatly defective, and disregards the most important occasions of military service, where the whole are under arms, as parade, review, drill, or battle. The former statute specified 'guard, party, or other duty under arms.' The omission of the words 'under arms,' removed one restriction without introducing a new one. The specification and the general expression each have their appropriate office. For example, a case specified is that of an officer of the guard, during his tour, even when engaged in no act of duty; and the general words provide for all actual occasions of duty. The construction of this article of war promulgated from the War Department in general order No. 7, 1856, is here affirmed; also the rule announced in that order and in general order No. 8, of that year, to the effect, that where a charge is laid *expressly and exclusively* under a particular article, the finding of the court is confined to that article.

"The court refused to admit on their record an argument of the judge advocate, objecting to an application by the defence for delay. It was the duty of the judge advocate to make the objection, and the argument by

which he sustained it was very proper. It was a part of the proceedings which ought to have been entered on their record."*

**Corresponding with the Enemy.** "Art. 57. Whosoever shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial."

By the 57th article of the act of Congress entitled An Act for establishing Rules and Articles for the government of the Armies of the United States, approved April 10, 1806, "holding correspondence with, or giving intelligence to the enemy, either directly or indirectly," is made punishable by death, or such other punishment as shall be ordered by the sentence of a court-martial. Public safety requires strict enforcement of this article. It is therefore ordered that all correspondence and communication, verbally or by writing, printing or telegraphing, respecting operations of the army or military movements on land or water, or respecting the troops, camps, arsenals, intrenchments, or military affairs, within the several military districts, by which intelligence shall be, directly or indirectly, given to the enemy, without the authority and sanction of the general in command, be and the same are absolutely prohibited, and from and after the date of this order persons violating the same will be proceeded against under the 57th article of war.†

**Conduct Unbecoming an Officer and a Gentleman.** "Art. 83. Any commissioned officer convicted before a

* G. O. No. 5, War Department, May 23d, 1857.

† G. O. No. 67, War Department, August 26th, 1861.

general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service."

In the case of an assistant surgeon of the army, who was put upon his trial, charged with "*conduct unbecoming an officer and a gentleman*," the following orders were issued by the secretary of war:

"When the proceedings in this case were first submitted to the department, it seemed to it that the finding of the court on the first charge was inconsistent with their finding on the specification to that charge, and in order to afford the court an opportunity of reconsidering it, the case was remanded to them. They have, however, thought proper to adhere to their former decision. As the matter is altogether one of opinion, the department will not interfere with that of the court. It deems it proper, however, with reference to cases that may hereafter arise, to make known its views on the 83d article of war, particularly as it appears that the court have not only misconceived the meaning and intent of the article, but perhaps its language.

"The court, in assigning its reasons for not applying the article to this case, say, that the conduct of the accused 'was not of that enormity (scandalous and infamous) which was contemplated by the article in question—such as degrades a man from the association of gentlemen, &c.'

"From these expressions the court were evidently of opinion that a party cannot be convicted under the 83d article of war, unless his conduct should be scandalous and infamous. Such is not the opinion of the department. The words 'scandalous and infamous' are not to be found in the 83d article. On the contrary, those

words were found in the old rules and articles of war, as enacted in 1776, and revised in 1786, in the article to which the 83d of the act now in force corresponds; and they were dropped at the revision by Congress in 1806, when the existing law for the government of the army was established. It cannot be doubted that this change was designed. It is therefore equivalent to a declaration by Congress that it should no longer be necessary in order to bring an officer within the scope of that article that the act charged should be 'scandalous and infamous,' provided it were 'unbecoming an officer and a gentleman.' Nevertheless the court have referred to these words as if they formed a part of the existing law.

"An officer of the highest merit may, from indiscretion or thoughtlessness, or from momentary excitement, do an act which all right-minded persons would consider as highly unbecoming a gentleman, and yet if it involved nothing dishonorable or morally wrong, he would not thereby forfeit his character as a gentleman.

"Assuming the facts found by the court to be true, the attack by Dr. S. upon Lieutenant S. was attended with many aggravating circumstances which distinguish it from an ordinary assault and battery. The court have found that it was premeditated and 'without good and sufficient cause;' that Dr. S. struck Lieutenant S. 'whilst he was looking in the opposite direction, and not prepared for an assault,' and this in the 'view of ladies, citizens, and soldiers.'

"Conduct like this would be considered highly reprehensible if committed by any one in civil life; and the department does not consider that either the character

or the interests of the army would be promoted by lowering the standard of propriety in the service, and converting conduct improper in itself—and whether committed by an officer or by any one else, into a mere breach of military discipline.

"The court may possibly have considered that the punishment prescribed by the 83d article was disproportioned to the offence committed by Dr. S., but that question was not submitted to them. The law in this case affixes the punishment, and it is the province of the revising power, and not that of the court, to mitigate it according to circumstances."*

* War Department, December 11th, 1852.

## CHAPTER XX.

# OF EVIDENCE.

It has been laid down as an indisputable principle that whenever a legislative act erects a new judica ture, without prescribing any particular rules of evidence to it, the common law will supply its own rules, from which it will not allow such newly erected court to depart. The rules of evidence, then, that obtain in the criminal courts of the country, must be the guides for courts-martial—the end sought for being truth, these rules laid down for the attainment of that end must be intrinsically the same in both cases. These rules constitute the law of evidence, and involve the quality, admissibility, and effect of evidence, and its application to the purposes of truth.

**Evidence** is that which, exclusive of mere argument, is legally offered to a court-martial, for the purpose of enabling them to arrive at the truth in any matter submitted to their determination.

Evidence is of two kinds: **Parol Evidence,** consisting of the *viva voce* examination of witnesses, and **Written Evidence.**

All evidence may be divided into direct or positive evidence, and indirect or presumptive evidence.

**Direct or Positive Evidence** is the testimony derived from those who had actual knowledge of the principal or disputed point.

**Indirect or Presumptive Evidence** is where an inference is made as to the truth of the disputed fact, from collateral facts ascertained by competent means. It is an act of reasoning.

**Proof** is where the evidence submitted, is sufficient to produce a conviction of the truth of the facts to be established.

Proof may be either positive, or presumptive.

**Positive Proof** arises from direct evidence, which if true, establishes or overthrows a fact immediately in question.

**Presumptive Proof** arises from presumptive evidence, that is, evidence which directly proves some fact, the truth of which indirectly proves or disproves some other fact which is immediately the subject of investigation.

The parties to a trial are *not permitted to adduce* every description of evidence which, according to their own notions, may be supposed to elucidate the matter in issue; if such a latitude were permitted, evidence might be often brought forward which would lead rather to error than to truth, the attention of the court might be diverted by the introduction of irrelevant or immaterial evidence, and the investigation extended to a most inconvenient length. In order to guard against these evils, certain rules for limiting and regulating the admissibility of evidence have been established from time to time.*

**Admissibility of Evidence.** It is the province of the court to decide all questions on the admissibility of evidence. Whether there is *any* evidence, is a question for the court as judge, but whether the evidence is *suf-*

* 1 Phillipps, 3; Simmons, 434.

*ficient*, is a question for the court as jury to determine; and this rule applies to the admissibility of every kind of evidence, written as well as oral.

There are certain conditions precedent which are required to be observed, before evidence is to be submitted for the consideration of the court. Thus an oath or its equivalent, and competency in a witness, are conditions precedent to admitting *viva voce* evidence—the burden of making out that a witness is incompetent, lies on the party who makes the objection;—so also is the fact of a person's expectation of immediate death, previously to the admission of proof of his dying declarations; and the proof of requisite search, previously to the admission of secondary evidence of lost writings.

The law excludes some descriptions of evidence as wholly improper to be submitted to the jury, and *rejects the testimony* of certain persons, who are on this account termed incompetent witnesses. The rules respecting these are chiefly founded on the consideration, that, in the generality of instances, the testimony of those witnesses would mislead the court, and it is obvious that the propriety of the exclusion in each particular case, must be judged of, according to the constitution of the tribunal to which the evidence is submitted, and with reference to the mode of proceeding before it.*

**Incompetency of Witnesses.** There are four cases in which a witness is deemed incompetent to give evidence:

1st. When a witness labors under a defect of understanding.

* 1 Phillipps, 5–7.

2d. When, from defect of religious principle, he does not acknowledge the sanction of an oath.

3d. When his character is infamous in consequence of a conviction of some crime.

4th. When he is interested, to any extent, in the matter in issue.

The *last two causes* of incompetency have, from time to time, and especially of late years, been very much questioned. By the British Act of Parliament of Au gust, 1843, these—with certain exceptions to the last—have been abrogated. The act lays down the broad principle, that it is desirable that "the persons who are appointed to decide upon the facts on issue should exercise their judgment on the *credit* of the witnesses adduced, and on the *truth* of their testimony;" and enacts "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest, from giving evidence." A change tending directly to the same conclusion, is now also taking place in all our states, but reserving, however, the right of showing such interest or conviction for the purpose of affecting the credibility of the witness.

1st. **Of Incompetency from Defect of Understanding.** Persons who have not the use of reason are from their infirmity utterly incapable of giving evidence, and are therefore excluded as incompetent witnesses. Such incompetency may arise, where there is a natural deficiency of the intellect, as in the case of idiots; or where the intellect has become disordered, as in the case of insane persons; or where the intellect is immature, as in the case of children.

An **idiot** is one who, from his nativity, is by a per-

petual infirmity *non compos mentis;* such a person is wholly incapable of giving evidence. But persons born both deaf and dumb, though *primâ facie* in contemplation of law idiots, yet if it appears that they have sufficient understanding and know the nature of an oath, they may give evidence by signs, through the medium of an interpreter; or if they are able to write, their testimony will be taken in writing, as the surest mode. A person, however, who is born deaf, dumb, and blind, is still looked upon by the law as in the same state as an idiot, being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.

Persons who have become permanently deranged in intellect, are incompetent. A **lunatic** is a person who enjoys intervals of sound mind, and may be admitted as a witness *in lucidis intervallis.* He must of course have been in possession of his intellect at the time of the event to which he testifies, as well as at the time of his examination; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed. With regard to those persons who are afflicted with *monomania*, or an aberration of mind on one particular subject, not touching the matter in question, and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind.

When a witness is *objected to* as incompetent *on the ground of mental derangement*, the party objecting has

the right to call witnesses and prove the fact. The want of reason renders the person incompetent; but this incapacity must be shown to the court by proof, like any other charge of incompetency. But when a person is called as a witness, who is at the time in a state of *intoxication*, the court have the power to decide from their own view of the situation of the witness offered, whether he be intoxicated to such a degree that he ought not to be heard. He is not incompetent, however, though he may have been judicially declared an habitual drunkard, provided he be sober when called to testify; and his intemperate habits cannot be proved in order to impeach him. If proved intoxicated at the time the events occurred, at least the credibility of his testimony might be questioned.

There is no precise age fixed, at which **children** are excluded from giving evidence. Their competency is now regulated, not by their age, but by the degree of understanding which they appear to possess. It has been decided that children of any age might be examined under oath, if capable of distinguishing between good and evil, and possessing sufficient knowledge of the nature and consequences of an oath; but that they cannot in any case be examined without oath. This is now the established rule, as well in criminal as in civil cases, and it applies equally to capital offences and to offences of an inferior nature.

In criminal cases, where a child is a necessary witness for the prosecution, and appears not sufficiently to understand the nature and obligation of an oath, it is competent to the judge to postpone the trial, that the child may be in the mean time properly instructed; this can-

not be done after the prisoner is put upon his trial. It has been held, however, that the effect of the oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, which have been communicated with reference to the trial.

Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive.*

2d. **Of Incompetency from Defect of Religious Principle.** The law requires that all witnesses who are examined before a court-martial, shall give their evidence under *oath or affirmation*. In taking an oath, a witness must be understood as making a formal and solemn appeal to the Supreme Being for the truth of the evidence which he is about to give, and further as imprecating the Divine vengeance on his head, if what he shall say be false.

An examination on oath or affirmation implies that a witness should go through a ceremony of a particular import, and also, that he should acknowledge the efficacy of that ceremony to speak the truth. It is therefore necessary, in order that a witness's testimony be received, that he should believe in the existence of a God by whom truth is enjoined and falsehood punished. It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the pun-

* 1 Phillipps, 10–14; Roscoe, 127.

ishment which the law inflicts upon persons guilty of perjury. The true test, therefore, of a witness's competency in this regard, is, whether he believes in the existence of God, and that an oath is binding on the conscience. It is not necessary that he should believe in a future state of rewards and punishments. An atheist, therefore, is excluded from being a witness. To prove his belief that there is no God, it is competent to show his settled and previous declarations on the subject. Though the witness may have been for this reason incompetent, yet if the objection has been removed by a change of views he should be examined.

Doubts formerly existed with respect to Jews and the inhabitants of countries professing religions different from Christianity. But a wiser rule has since prevailed, and it is now well settled that those infidels who believe in a God who enjoins truth and punishes falsehood in this world, though not believing in a future state, may be admitted as witnesses, and sworn according to the form which is authorized by their country or their religion.

The only **means of ascertaining the competency** of a witness, with reference to religious principle, is by examining the party himself. The proper mode of examination is not to question the witness as to his particular religious opinions, but to inquire generally whether he believes in the existence of a God, and whether he considers the form of administering the oath to be such as will be binding on his conscience.

The most correct and *proper time* for thus questioning the witness is before the oath is administered; but as it may happen that the oath may be administered in the

usual form before the attention of the court is directed to it, the party is not to be precluded; but the witness may, nevertheless, be afterward asked whether he considers the oath he has taken as binding upon his conscience. If he answer in the affirmative, it would be irrelevant to ask further, whether there be any other mode of swearing more binding than that which he has used. Such an acceptance of the oath not only imposes upon the witness all its religious obligation, but, should he violate its sanctions, subjects him also to the temporal penalties consequent on the crime of perjury.*

3d. **Of Incompetency from Infamy.** By the laws of England this cause of incompetency has been abolished, and the tendency of our laws and decisions leads to the belief that this will ere long be the case in this country.

The conviction of an infamous crime, followed by judgment, disqualifies a person from giving evidence; and persons rejected for this cause, are said to be incompetent on account of the infamy of their character. Of the crimes which incapacitate, the general description includes treason and felony, and every species of the *crimen falsi*. Thus, a conviction of forgery will disqualify, as will also all offences tending to pervert the administration of justice by falsehood or fraud. Of this nature are perjury and subornation of perjury; bribing a witness to absent himself, in order that he may not give evidence; conspiring to procure the absence of a witness; conspiring to accuse another person of a capital offence.

A person incompetent to give oral evidence in court,

* Roscoe, 127–132.

on the ground of infamy, will not be allowed to have his affidavit read, unless it be to defend himself against a complaint. Having attested a written instrument as a subscribing witness before conviction, his handwriting may be proved afterward, the same as if he were dead. And though the general rule is, that in actions between third persons his testimony must be excluded, he is allowed, in cases where he is a party, to make affidavits in exculpation or defence of himself.

In order to **exclude the witness** as incompetent, his incapacity must be established by the production or proof of a judgment of a court of competent jurisdiction; for it is the judgment which is received as the legal and conclusive evidence of his guilt. Parol evidence could not therefore be given of it, and though he himself should admit that he was convicted of felony, this would not render him incompetent. So where a witness admitted himself guilty of perjury, this went to his credibility and not to his competency; and he was not inadmissible though he admitted that he had perjured himself on the point in question.

When the convicted party has suffered the punishment awarded, he is again *rendered competent*, except in cases of particular crimes, such as perjury and subornation of perjury. It does not seem clear whether the restoration to competency, by suffering a sentence, has proceeded on the ground of incompetency being in the nature of punishment, or on the ground of a regenerating effect of punishment upon the moral feelings of the offender.

The competency of the witness may in general be restored by reversal of the judgment, or by a pardon.

The reversal of the judgment is proved in the same manner as the judgment itself; and the pardon is proved by its production under seal. If the pardon be conditional, the performance of the condition must be shown. The pardon restores the party to all his rights, and is said to make the witness a new creature and give him a new capacity. And this is clearly so, where the incompetency is the consequence of the conviction and judgment; but where the disability is annexed to the conviction of a particular offence by the express words of a statute, the general rule is, that a pardon will not restore his competency. Nothing less than a legislative act, or a reversal of judgment can restore competency in such a case.*

A conviction of a *crime in another state* is not admissible in evidence for the purpose of impeaching the credit of a witness. But a conviction in another state of a crime, which by the laws of that state, disqualifies the party from being heard as a witness, and which, if committed here, would have operated as a disqualification, is sufficient to exclude him from testifying here, the same as if it had been committed and the conviction had taken place in this jurisdiction.

4th. **Of Incompetency by Reason of Interest.** The general rule, that all persons interested, to however small a degree, in the event of a cause, should be excluded from giving evidence in favor of that party to whom their interest inclined them, has been recently annulled in Great Britain, and the incompetency limited to special cases. This is also the case in many of our states, and the belief is reasonable that in time the rule of incompe-

* 1 Phillipps, 22.

tency from this cause will be swept away throughout the country. The general rule seems to rest upon the unsound principle, that the situation of the witness will tempt him to perjury; that in the majority of instances men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit as to deceive courts and juries. This is contrary to all experience. Witnesses are generally honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected. The rule is as unsound in theory as it is inconsistent in practice, because the law admits witnesses far more likely to be biased in favor of the party than he who has a mere interest. A father may testify for his son; a child living with his father and dependent upon his bounty, may appear as his witness without question. Is the immediate gain by the result of the cause, so potent as to outweigh integrity, while affection, consanguinity, dependence, are put down as dust in the balance? It is wiser, certainly, to place the witness on the stand, and let the jury judge of his testimony.*

On a trial before a court-martial, the *accuser or party aggrieved* is a competent witness, though he may himself have originated the charges, or may, in any other way, be materially interested in the result. The trial, though set in motion at the instance of the aggrieved party, has not for its object the reparation of individual injury, but the satisfaction of public justice. The innocence or guilt of the prisoner is the single question upon which the court pronounce their verdict.

The expectation of a benefit, not necessarily and legal-

* 1 Phillipps, p. 25.

ly flowing from the event of the proceeding, does not render the witness incompetent—as the promise of a *pardon*. So where a woman gave evidence against a prisoner under the hope that his conviction would tend to procure the pardon of her husband, who had been convicted, it went to her credit only and not to her competency. Persons who are entitled, under the general regulations of the army, to a *reward* for the apprehension and delivery of deserters, are competent witnesses. So in prosecutions where there are rewards, although the rewards can only be the effect of the conviction, the prosecutors are competent witnesses, yet every man who comes as a witness under the idea of having a reward on the conviction of the prisoner, might be said to be interested in the event of the cause. Where a party is entitled to a pardon, provided another offender be convicted on his testimony, the party so entitled is a competent witness.

Mere *interest or bias*, arising from the witness standing in the same situation as the party by whom he is tendered, is not sufficient. Thus, when several persons are separately charged for perjury in swearing to the same fact, any of them may be before conviction a witness for the others, because he is not interested in the event. Nor is a person incompetent because he is personally interested in a similar question to that upon which he is called to give evidence.

If the witness lay a *wager* that he will convict the prisoner, he is still competent, though it goes to his credit.

With regard to the competency of *parties defending in criminal prosecutions*, as they are generally most

strongly interested in the event, it seldom happens that they can be called as witnesses. One of the several persons jointly indicted or charged, may, however, be rendered competent to give evidence, either for the prosecution or for his codefendants. Thus, if a *nolle prosequi* be entered, either before or at the trial, as to one of the defendants, such defendant may be called as a witness for the government against his codefendants.

In like manner, one of several defendants may be rendered competent in some cases by a *separate verdict* at the trial. As where it appears at the close of the case for the prosecution, that there is no evidence against one of the defendants, a separate verdict of acquittal may be taken as to him, and he may then be called as a witness on behalf of the others. This procedure cannot be exactly followed by courts-martial, from the necessity of subsequent approval of the verdict of acquittal. The court might however adjourn until the case is acted upon by the confirming authority, then reassemble and proceed with the other cases. A prisoner, who may desire to avail himself of the evidence of a person involved in the same charge, should, on the receipt of the copy of charges and specifications alleged against him, urge the necessity of his separate trial, and should the convening authority neglect his representation, he should apply directly to the court-martial.

Simmons quotes from a letter of Lord Erskine, that covers the case in point. "The case of one of the mutineers at Portsmouth I remember more distinctly. He was tried with others, and as it was likely that against *one of them, who knew the innocence of the person in question*, no evidence could be given, I advised the at-

torney who was employed by him, if that turned out to be so, to apply to the court, on the authority of my opinion, to direct such person to be acquitted, and then to permit him to establish, by his evidence, the innocence of the man in question. This application being accordingly made, the court declared itself to be satisfied, that the course proposed was agreeable to the practice of the courts of criminal law, but not of courts-martial; they therefore refused to adopt it, and having no other defence, he was sentenced to be executed." Lord Erskine then suggested to his majesty "that the court-martial ought to have conformed to the rule established in the common law courts, and implored the king to respite the execution, and to submit the case to the twelve judges for their decision on it. The judges having decided unanimously that the conviction was *unwarranted*, the man was set at liberty."*

A prisoner, who has pleaded *guilty* to a charge, is a competent witness against other defendants joined in the same charge, on the ground that he is not a party to the issues; the only issues being whether the other prisoners are guilty or not.

Some difficulty might, perhaps, arise in cases where one of several defendants has pleaded guilty to a charge, where the gist of the offence lies in its joint commission by all or a certain number of the parties charged: *e., g.*, in an indictment against A and B for a conspiracy: in such case, if A had pleaded guilty, and were called as a witness for B, he would have a direct interest in procuring the acquittal of B; as in that event, it seems doubtful whether any valid judgment could be pronounced against

* Simmons, 453, note.

the defendant who had pleaded guilty. Nevertheless, it appears the witness could not be objected to on the score of interest alone; that would be a matter affecting only his credibility, as he would not be a party to the issue. The witness, in fact, would seem to stand in the same position as if he were not joined in the indictment, but the other defendants were indicted alone for conspiring with him, the witness; in which case there seems to be no doubt but that he would be competent.*

**Husband and Wife** are not admitted as witnesses for or against each other, in any trial, where one of them may be a party. The declarations of husband and wife are subject to the same rule of exclusion as their *viva voce* testimony. No other relation, however, is excluded: a father may give evidence for his son, or the son for his father; although the relation between them may influence his testimony, it will not render him incompetent.

The *reason* for excluding the husband and wife from giving evidence for or against each other, is founded partly on their identity of interest, and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses *for* each other, because their interests are absolutely the same; they are not witnesses *against* each other, because this is inconsistent with the relation of marriage, and the admission of such evidence would lead to disunion and unhappiness, and possibly to perjury.

This **general rule** of evidence, which has been adopted for the purpose of promoting a perfect union of

* Phillipps. 55–56.

interests, and of securing mutual confidence, is so strictly observed, that even after a dissolution of marriage by divorce, neither the wife nor the husband is admitted to give any evidence of what occurred during the marriage, which would have been excluded if the marriage had continued. Thus one great cause of distrust is removed by making the confidence, which once subsists, ever afterward inviolable in courts of law. Upon the same principle, where the marriage has been terminated by the death of either party, the survivor will not be permitted to give evidence of transactions that occurred during the marriage. The wife, for instance, cannot prove a contract made by her husband.

The rule is intended solely for the protection of persons who have entered into the relation of husband and wife; and does not extend to those who, not being married, have lived together and cohabited as man and wife.* Therefore in an indictment for bigamy, after proof of the first marriage, the second wife is a competent witness for or against the husband, for the marriage is void.

It is not in every case in which the husband or wife may be concerned, that the other is precluded from giving evidence. Although the husband and wife are not allowed to be witnesses against each other, where either is directly and immediately interested in the event of a proceeding whether civil or criminal, yet, in *collateral proceedings* not immediately affecting their mutual interest, their evidence is receivable, notwithstanding that the evidence of the one tends to contradict the other, or may subject the other to a legal demand, or even to a

* 1 Phillipps, pp. 78–81.

criminal charge. Indeed it would seem now to be the settled doctrine, both on authority and principle, that husband and wife may be received to contradict or criminate each other in a collateral matter, that is, in all cases except where one is called to contradict or criminate the other as a party to some cause. A wife may be a witness in an action between third persons not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand; and though upon her testimony the defendant might have a verdict, and an action might afterward in consequence be brought against the husband, she would not then be admitted as a witness, nor could her evidence in the first suit be produced against him.

In all cases of **personal injuries** committed by the husband or wife against each other, the injured party is an admissible witness against the other. The evidence is admissible in such cases upon the principle of necessity; not a general necessity, as where no other witness could be had, but a particular necessity, as where, for instance, the injured party might be otherwise exposed, without remedy, to personal injury. Thus on a prosecution against a man for beating his wife, she is allowed to give evidence.*

The deposition of a wife *in extremis*, is admissible against the husband charged with her murder, upon the same principle, that the evidence of the wife, if living, would be received to prove a case of personal violence.

It has been erroneously imagined by some military men, that on a charge before a court-martial for a breach of military discipline, the wife of the prosecutor

* 1 Phillipps, pp. 84–96.

is not a competent witness. Her testimony may be suspicious in an equal degree with that of the prosecutor; but there is no rule or reason to exclude it. The proceedings being at the suit of the crown, as in criminal cases, her evidence would be admitted upon the same principle as that of the prosecutor. Any attempt to deceive may be exposed with greater facility by the opportunity afforded of cross-examining two individuals to the same fact, than if one only was admitted to give evidence; if, therefore, the accused be innocent of the charge, the advantage of separately examining both husband and wife is entirely in his favor.*

**Accomplices.** The evidence of accomplices has been at all times admitted, and its admission has been supported on the ground of public policy and necessity, for its being scarcely possible to detect conspiracies and many of the worst crimes, without their information. The credit of what is said by the witness, as in all other cases, must be left to the jury who are judges of the matter of fact and of the credibility of witnesses. The object of admitting such evidence is, in order to effect the discovery and punishment of crimes which cannot be proved against the offenders without the aid of the accomplice's testimony.

Accomplices are admitted to give evidence under an implied *promise of pardon*, on condition of their making a full and fair confession of the whole truth; that is, of all the offences about which they might be questioned, and of all their associates in guilt. This implied promise arises from the consideration that the witness, who is not bound to criminate himself, does so to discover

* Simmons. p. 457.

greater offenders. If he acts in good faith, and is admitted by the court as a witness, the government is honorably bound to discharge him. With regard to other offences with which the prisoner at the bar is not charged, an accomplice can derive no advantage from such equitable claim to a pardon; the claim must be considered as limited to the particular offence, for the prosecution of which his testimony is admitted.

For the *admission of an accomplice to testify*, a motion should be made to the court by the public prosecutor, and the court, under the circumstances of the case, will admit or disallow the evidence, as may most effectually answer the purposes of justice. On motion to admit him as a witness, it should be shown that his testimony is absolutely essential to prove the commission of the crime by the party on trial, and that the person proposed to be admitted is not more guilty than the other.

As an accomplice is not an incompetent witness for the prosecution, it follows that he will be also a competent witness on behalf of the prisoner, notwithstanding he may be himself charged on a separate indictment. Where several persons are jointly indicted, one is not a competent witness for another, without being first acquitted or convicted, and it makes no difference whether the defendants plead jointly or separately.

Since accomplices are competent witnesses, it appears to follow as a necessary consequence, that if their testimony is believed by the jury, a prisoner may be *legally convicted* upon it, though it be unconfirmed by any other evidence. It is the peculiar province of the jury to determine upon the degree of credit to be attached to any competent evidence submitted to their considera-

tion; and it has accordingly been laid down in many cases as a settled rule, that a conviction obtained upon the unsupported testimony of an accomplice is strictly legal. This doctrine has however been greatly modified in practice; and it has long been considered as a general rule of practice, that the testimony of an accomplice ought to receive confirmation; and that, unless it be corroborated in some material part by unimpeachable evidence, the prisoner ought to be acquitted. This practice applies equally when two or more accomplices are brought forward against a prisoner.*

**Professional Confidence, and Privileged Communications.** Although a witness is sworn to speak the truth, the *whole* truth, and nothing but the truth, yet there are certain matters which he is not only not bound to disclose, but which it is his duty, even under the obligation of an oath, not to disclose. Where a communication takes place between a counsel and his client, or between the government and some of its agents, such communication is privileged, on the ground that should it be suffered to be disclosed, the due administration of justice and government could not proceed; such administration requiring the observance of inviolable secrecy. But the rule does not extend beyond the two classes of persons above mentioned, whatever obligation of concealment the party may have incurred.

Except in the case of matters of state, the privilege of not disclosing confidential communications, is confined to *counsel*, solicitors, attorneys, and their agents and clerks. Other professional persons, whether physicians, surgeons, or clergymen, have, it seems, no such privilege.

* 1 Phillipps, 105–113.

A person who acts as an *interpreter* between a client and his attorney, will not be permitted to divulge what passed; for what passed through the medium of an interpreter, is equally in confidence as if said directly to the attorney; but it is otherwise with regard to conversation between the interpreter and the client in the absence of the attorney. So the agent or the clerk of the attorney stands in the same situation as the attorney himself.

**The privilege** is that of the client and not of the attorney, and the courts will prevent the latter, although willing, from making the disclosure. But if the attorney is called by his client, and examined as to a matter of confidential communication, he may be cross-examined as to that matter though not as to others. The rule applies also to the professional advisers of strangers to the inquiry. Thus an attorney is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court.

If a person not being an attorney is consulted by another, under a false impression that he is such, he will not be privileged from disclosing what passes. So an attorney is not privileged from disclosing matters communicated to him before his retainer, or after it had ceased, for then he stands clearly in the same situation as any other person.*

*In general*, a witness who is privileged from disclosing facts which have come to him in his professional capacity, is sworn in the usual manner to speak the truth, the *whole truth*, and nothing but the truth. The general obligation of an oath to declare the whole truth,

* Roscoe, 186, 187.

must, however, with reference to the subject matter and occasion of the oath, be necessarily understood to mean the truth so far as it ought legally to be made known.*

There are cases to which the law of privilege is not extended, and this is much to be lamented. As for instance, those in which *medical persons* are obliged to declare the information which they have acquired by attending in their professional characters. In several of the United States, as New York and Missouri, physicians and surgeons are not allowed to disclose any information they may have acquired in attending a patient professionally, where such information was necessary to enable them to do any professional act for the patient.

Confidential communications to *a friend* are not privileged; in cases criminal as well as civil, he is compellable when required by courts of justice to disclose them, although made under an injunction and promise of secrecy.

A confession to a *clergyman or priest* is not privileged by the general rule. But by some it has been contended that an exception should be made with regard to confessions made to a Catholic priest, upon the ground that confession in the Roman Catholic church is a religious duty, and that to compel the disclosure by means of punishment, would be in effect to punish the party for religious opinions. By the laws of New York and Missouri, no minister of the gospel, or priest of any denomination, is allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules and practice of such denomination.

* 2 Starkie, 232.

**Privileged communications** include all statements and writings made or given by a client to his attorney or counsellor, for the purpose of obtaining professional advice or assistance. A communication if confidential is privileged, in whatever form it is made. If it would be privileged when communicated in words, spoken or written, it will be privileged, equally, when conveyed by means of sight instead of words. Thus, an attorney cannot give evidence as to the fact of the destruction of an instrument which he has been admitted in confidence to see destroyed. Directions made by his relations or friends previous to trial; memorials laid before counsel; notes furnished to agents or the like, if done with that view—all these are privileged communications. The principle of protection must obviously preclude an attorney from producing or disclosing the contents of papers deposited with him, confidentially, in his professional character.*

When once the privilege has attached, it continues forever, even though the confidential relation between the parties may have ceased.

Where the subject inquired into is a *collateral matter of fact*, which the party setting up the privilege obtained a knowledge of in his individual capacity, and not in his character of professional adviser, he will be compelled to disclose it.

**Official communications** may be privileged. If the communication be in writing, and it is held that the document cannot on principles of public policy be read in evidence, the effect will be the same as if it be not in existence, and you may prove, not the contents of

* 1 Phillipps, 136–145.

the instrument, but what was done by the orders of the superior.

The *proceedings of a court of inquiry* are, by our rules and articles of war, privileged in capital cases, or those extending to the dismission of an officer;—but may be admitted as evidence by a court-martial in all other cases, provided that the circumstances are such that oral testimony cannot be obtained.*

**Negroes.** There is still another class of persons in this country, in relation to whom questions of competency have arisen before courts-martial. These are negroes, or of African blood, and upon this fact the objections to their competency are based.

In the case of Dr. Fellows, assistant surgeon, United States army, tried at Fort Niagara, N. Y., in 1838, the accused presented a colored person to be sworn as a witness for the defence. A member of the court objected to him as being incompetent. The judge advocate briefly stated that the evidence of such persons was not excluded, either by the United States laws, or the laws of the state of New York, and that unless other objections to his competency than the one urged were presented, the court-martial must receive it; and that the court could not go beyond impeaching his credibility. After due deliberation, the court decided that the person was competent, and his evidence was admitted in the usual way. The reviewing authority approved the proceedings of the court.

The same question arose, pending the trial of Lieutenant Hooe, United States navy, in Pensacola Harbor, Florida, in 1839. Two free colored persons, seamen,

* 92d article of war.

were introduced as witnesses for the prosecution, took the oath and gave evidence, the court admitting their competency. The accused protested against the admission of such evidence, on the ground that he conceived their testimony altogether illegal; and that it would be so considered before the civil tribunals of Florida, the forms and customs of which, he thought, should be as closely followed by a court-martial as possible. The trial having been concluded and sentence pronounced. Lieutenant H. appealed to the President of the United States, urging the same objections as sufficient to vitiate and set aside the whole proceedings. The sentence of the court was however approved by the Navy Department, and carried into effect by its order, under the implied sanction of the President, and after having obtained the opinion of the district attorney of the United States, Mr. Key, in the absence of the attorney-general. The following is extracted from that opinion: "The accused objected that, by the laws of Florida, where the court-martial was held, such persons are not competent to testify against a white person; and he therefore contended that they should be in like manner excluded from testifying on courts-martial. Such a consequence would not follow from the law of Florida. The officers composing the court were bound to admit the witness, unless some legal disqualification was shown. This could only be by a law of Congress. Whether it be right that there should be a law requiring courts-martial of the United States to reject all such witnesses as are disqualified by the laws of the state or territory where the courts may be held, is a question for Congress alone. Till they enact the disqualification, it

cannot be enforced. The court could not do otherwise than admit the testimony."

The House of Representatives called for a copy of the record of the proceedings, &c., in the above case. In answer to the call, the secretary of the navy remarks: "In submitting these documents, it seems proper to state that the department has not, in approving the judgment of the court-martial, made any decision on the legality or illegality of admitting the testimony of free colored persons who are enlisted on board of a vessel of the United States. No law exists, within the knowledge of the department, to regulate this practice; and as a decision of the point one way or the other was not called for to regulate the opinion of the department as to the correctness of the judgment, it was deemed improper, under such circumstances, to decide a legal question not provided for by any act of Congress, and which would, when decided, affect the rights (if they exist) of officers and seamen to produce such testimony, even in their own defence, and when tried on capital charges."*

In the absence of all statute laws settling this question, and in view of the utterly divergent and irreconcilable opinions, on the subject of slavery, held by different sections of the country, it is the policy of all courts-martial to be guided and governed in such cases, by the rules that regulate the federal courts of law, and which are in harmony with the rules of evidence of the particular states or territories in which these courts may hold their sessions.

It is a settled point at common law, that a slave cannot be a witness, because of the unbounded influence of

* Doc. No. 244, H. of R., 26th Congress, 1st Session.

his master over him, which is at least equal to duress. But it has been said, that the declarations of a slave in respect to his health are admissible, to show the effects of a blow.

**Hearsay Evidence.** The term *hearsay* evidence is used with reference both to that which is written, and to that which is spoken. But in its legal sense, it is confined to that kind of evidence which does not derive its effects solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information. The general rule is, that **hearsay evidence is not receivable.** It is inadmissible on two grounds: first, that the party originally stating the facts does not make the statement under the sanctity of an oath; and secondly, that the party against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement. By our articles of war, every fact for or against a prisoner must be proved on oath,* and by the constitution the accused must "be confronted with the witnesses against him."†

Besides these tests, it must be considered that such evidence is very *liable to be fallacious*, from the facility with which it may have been imperfectly heard, or from having been misunderstood or inaccurately remembered, or perhaps perverted, or possibly altogether fabricated. It is to be observed also, that persons communicating such evidence are not subject to the danger of a prosecution for perjury; for where the hearsay statement is said to have been made when no third person was

* 73d article of war. † 6th Amendment to the Constitution.

present, the witness has no cause to be apprehensive of punishment, even though he has entirely fabricated the statement.*

**Verbal and written declarations** are often said to be admissible, as constituting a part of the *res gestæ*. As such, they are most properly admissible when they accompany some act, the nature, objects, or motives of which are the subject of inquiry. For where words or writings accompany an act, or where they indicate the state of a person's feelings, or bodily sufferings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant. Where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*. On the trial of an indictment for manslaughter, declarations made by the prisoner at the commencement of, and during the fatal affray, as well as immediately before and after it, must be received as constituting a part of the *res gestæ*.

The declarations of a party are admissible *in his favor*, when they are so connected with some material act as to explain or qualify it, or show the intent with which it was done.

Where a prisoner indicted for murder has produced evidence of declarations by the deceased, with a view to raise the presumption that he committed suicide, it is competent for the prosecution to give in evidence the reasons assigned by him for his declarations.

It is not competent for a prisoner indicted for murder,

*1 Phillipps, 212.

to give in evidence his own account of the transaction, related immediately after it occurred, though no third person was present when the homicide was committed.

When the state of mind, sentiment, or disposition of a person at a given period, become pertinent topics of inquiry, his declarations and conversations, being part of the *res gestæ*, may be resorted to.*

If it be material to inquire *when a certain person gave a particular order* on a certain subject, what he has said or written may be evidence of the order; or where it is material to inquire whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written may as clearly show his knowledge as what he has done.

Analogous to the cases in which hearsay evidence is admissible as being part of the *res gestæ*, are the cases of **dying declarations.** It is said by Eyre, C. B., that the general principle upon which evidence of this kind is admitted is, that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.

Evidence of this kind, which is peculiar to the case of homicide, has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye-witness to the fact.

* Roscoe, 22, 25.

It shall not be allowed to the offender to commit a homicide, and by the same act put to silence the only witness at whose mouth he may be condemned.

Where the declarations offered in evidence as to the cause of death, are of a deceased who has been *particeps criminis*, they are, nevertheless, as it seems, admissible against the other party, though it may need corroboration.

The *statement of the deceased* must be such as would be admissible if he were alive and could be examined as a witness; consequently a declaration upon matters of opinion as distinguished from facts, will not be receivable.

Dying declarations *in favor* of the party charged with the death, are admissible in evidence equally as where they operate against him.

It is no objection to a dying declaration, that it has been *elicited by questions* put to the deceased; he may be examined upon oath by a magistrate, and the examination be signed by both, but where this is the case, neither a copy of the paper nor parol evidence of its contents can be received.

The question, *whether a dying declaration is admissible in evidence*, is exclusively for the consideration of the court. And it is a general rule that dying declarations, though made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations.*

Before dying declarations can be received in evidence,

* Roscoe, 27, 28.

inquiry must be made, whether the deceased apprehended that he was in such a state of mortality, as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions. In this inquiry it is not necessary that the deceased should have explained by any expressions, whether he thought himself likely to live or die, if it be clear that the party did not expect to survive the injury—if his condition was such that he must have felt that he was a dying man. Positive evidence of this knowledge is not required; but it may be inferred from the general conduct and deportment of the party. It is necessary to hear all that the party said relative to his situation, in order to ascertain whether he had that impression upon his mind, which will make his declarations admissible in evidence.

Dying declarations are, of course, *open to direct contradiction* in the same manner as any other part of the case for the prosecution, and the prisoner is at liberty to prove that the character of the deceased was such that no reliance is to be placed on his dying declarations. If the deceased by reason of infancy, or imbecility of mind, or a disbelief in a God, would have been excluded as a witness while living, his dying declarations would, for like causes, be rejected by the court.

As the declarations of a dying man are admitted, on a supposition that in his awful situation he had the strongest motives to speak without disguise and without malice, it necessarily follows that the party against whom they are produced in evidence, may enter into the particulars of his state of mind, and of his behavior in his last moments; and may be allowed to show that

the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution.*

**The testimony on a former trial** of a witness subsequently deceased, or who, having been duly summoned, may appear to have kept away by contrivance and collusion, or who may have become insane in the interval, may be given in evidence by a person who heard the deposition, the parties to the suit and the points in issue being the same. As to the person by whom the former *viva voce* testimony may be proved, the decisions in all cases agree that this may be done by any one who heard the testimony, the judge, counsel, jury, or bystander, provided he will, on his oath, undertake to repeat it in such detail as the practice of the courts may require. It has been held that the person called must undertake to repeat precisely the very words of the deceased witness, and not merely to swear to their substance or effect. The rule, if applied in that degree of strictness, would be practically useless; for there are few men, if any, be their powers of recollection what they may, who could be qualified to give such evidence; and if he should undertake positively to swear to the very words, the jury ought on that account alone to disbelieve him. The doctrine both of reason and authority seems to be that the evidence of the deceased witness may be proved, if the person proving it will swear that he gives the matter *substantially*.

**This exception** to the rule of hearsay evidence may by possibility apply on an appeal from a regimental to a general court-martial; or where testimony elicited

* Phillipps.

before a court of inquiry is required before a general court-martial; or where from the death or sickness of members the former court has been dissolved, and a new court being ordered, the proceedings are commenced *de novo*.

**Confessions.** The confessions of prisoners are received in evidence, upon the presumption that a person will not make an untrue statement against his own interest. But it is to be observed that there may not unfrequently be motives of hope and fear inducing a person to make an untrue confession. And further, in consequence of the universal eagerness and zeal which prevail for the detection of guilt, when offences occur of an aggravated character—in consequence also of the necessity of using testimony of suspicious witnesses for the discovery of secret crimes, the evidence of confessions is subject in a very remarkable degree, to the imperfections attaching generally to hearsay evidence.*

With regard to the **degree of credit** which ought to be attached to a confession, much difference of opinion has existed. By some, a free and voluntary confession has been considered as forming the highest and most satisfactory evidence of guilt—as deserving of the highest credit because it is presumed to flow from the highest sense of guilt, and therefore admissible as proof of the crime to which it refers. On the other hand, it has been held that hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported through ignorance, inattention, or malice, and they are extremely liable to

* 1 Phillipps, p. 532.

misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted.*

Although it can hardly be conceived that any one would make a free and voluntary confession of guilt, so diametrically opposed to the feelings and principles that govern our actions, if the facts confessed were untrue, yet instances have occurred in which innocent persons have confessed themselves guilty of crimes of the gravest character.

Confessions are reducible to three classes. *First*, a confession in open court, by the prisoner, of his own guilt—this is conclusive, and no proof is necessary. *Second*, a confession made before a magistrate; and, *third*, a confession made to any other person—this is the weakest and lowest of all, and often demands proof of corroborating circumstances to sustain it.

**A voluntary confession** made by a person who has committed an offence, although not conclusive, is evidence against him upon which he may be convicted, notwithstanding the confession is totally uncorroborated by other evidence—provided the *corpus delicti*, the act constituting the crime, be proved by other evidence.

It has been considered necessary in all cases, previous to receiving a confession in evidence, to inquire whether it has been voluntary. The usual questions are, whether the prisoner has been told that it would be better for him to confess, or worse for him if he did not confess, or whether any language to that effect has been used. The object of the rule relating to their exclusion is, to

* Roscoe, p 38.

exclude all confessions which may have been procured from the prisoner, by leading him to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. Confessions, therefore, which are obtained from the accused by his being improperly operated upon, are incompetent evidence, and should as such be entirely rejected by the court, upon the preliminary inquiry into the circumstances under which they are obtained.

The general rule upon this subject may be thus stated: a promise of benefit or favor, or threat or intimation of disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement, either of hope or fear. And the same principle applies, if the inducement has been held out by a person without authority, but in the presence of a person who has such authority, and with his sanction either expressed or implied, who gives no caution and expresses no dissent.

But a **confession made in consequence of an inducement** held out by a person who has no authority, and cannot reasonably be supposed to have any, is not liable to the suspicion or presumption of being untrue, and therefore it seems settled, that under ordinary circumstances, a confession is not to be excluded on account of its having been made under an inducement held out by such person, provided always that the prisoner is aware that the person has no authority whatever.

It *should be considered* that the confession is generally made in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spir-

its sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tortured with anguish and difficulties gathering into a multitude. How easy is it for the hearer to take one word for another, or take a word in a sense not intended by the speaker! And for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make a third person understand the exact state of his mind and meaning. For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity or promises of favor, and of every influence, even the minutest.*

The *confession will not be excluded* even where undue influence has been exerted, if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence upon the mind of the party. Thus, if the impression that a confession is likely to benefit him has been removed from the mind of a prisoner, what he says will be evidence against him, although he has been advised to confess; but there must be very strong evidence of an explicit warning not to rely on any expected favor, and that the prisoner thoroughly understood such warning, before his subsequent confession can be given in evidence.

Where a person has made a confession in the hope of obtaining a reward or pardon from government, and of

* State *vs.* Fields and Webber, Peck's Rep., 140.

being admitted state's evidence, his confession is admissible against him, unless it appear that at the time of making the confession he knew that a reward had been offered; if he was aware of the offer before he made the confession, it would not be admissible.

If a party has been admitted *state's evidence* and has confessed, and upon the trial refuses to give evidence, his own confession will be evidence against himself.*

It is *not every hope of favor* held out to a prisoner that will render a confession afterward made by him inadmissible: the promise must have some reference to his escape from the charge. The threats or promises must have reference to some temporal advantage, in order to invalidate a confession. Where a prisoner accused of a murder had repeated interviews with a clergyman, who urged him to repentance, telling him that "before God it would be better for him to confess his sins," that "his fears respecting his participation in the dreadful deed were fully confirmed, and that, while he was in that state of mind, he (the chaplain) could afford him no consolation by prayer," and subsequently to these exhortations, the prisoner made a confession; the judges were unanimously of opinion that it was properly received in evidence, and the prisoner was executed.†

Where a confession has been obtained by *artifice or deception*, but without the use of promises or threats, it is admissible. In one case artifice was used to induce a prisoner to suppose that some of his accomplices were in custody, under which mistaken supposition he made a confession, and it was admitted in evidence. So where

* 1 Phillipps, 551. † Roscoe, 41

a prisoner asked the turnkey if he would mail a letter for him, and on receiving a promise that he would do so, gave him the letter; it was detained by the turnkey, and given in evidence as a confession at the trial.

**A question** has sometimes arisen, whether a statement which has been made by a party upon an examination as a witness, against another person on a distinct charge —provided there has been no promise of favor or of reward for information, nor threats made to induce him to confess—can be received in evidence against him, if he himself should be put upon his trial for the same offence. The more recent decisions seem to make against their admissibility, at least where the prisoner was not cautioned beforehand. Although it is said by Starkie, that when a witness answers questions upon his examination on a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes. By the Vth amendment to the constitution, no person "shall be compelled, in any criminal case, to be a witness against himself," and the 69th article of war makes it the duty of the judge advocate to object "to any question to the prisoner, the answer to which might tend to criminate himself," thus barring the reception of all compulsory evidence tending to the crimination of any individual. Where such answers are made freely and voluntarily, they are, of course, admissible against him.

Although a confession obtained by means of promises or threats cannot be received, yet if, in consequence of that confession, *certain facts* tending to establish the guilt of the prisoner *are made known*, evidence of those facts may be received. Facts thus obtained must be

fully and satisfactorily proved, without calling in the aid of any part of the confession from which they have been derived, or at most by admitting only so much of the confession as relates strictly to the facts discovered by it. For instance, a prisoner made a statement to a policeman under circumstances that precluded it from being given in evidence, but the statement contained some allusion to a lantern which was afterward found. It was decided that the words used by the prisoner with reference to the thing found ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a certain pond. The other parts of the statement were not received.*

In former times it was usual to admit the confessions of prisoners, *even of such as had afterward been executed*, as evidence against others, and this at a period when torture was not unfrequently applied in order to obtain confessions; as upon the trials of the Earl of Essex and Sir Walter Raleigh—in the latter of which Sir E. Coke says, that the *law presumes* a man will not accuse himself for the purpose of accusing another. The rule at present is, that a confession is only evidence against the party himself who made it, and cannot be used against others. Upon the same principle, the confession of the principal is not admissible in evidence, to prove his guilt upon an indictment against the accessory.

In general, a person is not answerable criminally, for the acts of his *servants or agents*, and therefore the declarations or confessions of a servant or agent will not

* Roscoe, 51.

be evidence against him. But it is otherwise where the declaration relates to a fact in the ordinary course of the agents' employment, in which case such declarations accompanying an act done, will be evidence in a criminal proceeding, as well as in a civil suit.

In criminal as well as in civil cases, **the whole** of an admission or confession made by a party is to be given in evidence. The rule does not exclude a confession where only part of what the defendant said has been overheard. And if a prisoner, in speaking of the testimony of one who had testified against him, says, that "what he said was true so far as he went, but he did not say all or enough;" this is not admissible as a confession, nor does it warrant proof of what the witness did swear to. There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the evidence is contradictory to another. It must not, however, from this, be supposed that every part of a confession is entitled to equal credit. A jury may believe that which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing. Thus, a prisoner charged with murder stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it;—the judge left the confession to

the jury, saying: "It must be taken altogether, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it, and disbelieve another." Also, if a person in making an admission against his own interest refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shown before the statement can be used as evidence against him.

An admission on the part of the prisoner is not conclusive, and if it afterward appear in evidence that the fact was otherwise, the admission will be of no weight. Thus upon an indictment for bigamy, where the prisoner had admitted the first marriage, and it appeared at the trial that such marriage was void for want of consent of the guardian of the woman, the prisoner was acquitted. Such are confessions of matters *void in point of law, or false in fact.*

Where a confession has been taken *in writing*, the document must be produced. But a written examination will not exclude proof of a confession made previously or subsequently, to the prosecutor or any other person.

For the purpose of **introducing a confession** in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made. If there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed in the first instance by the prosecutor calling such officer.*

* Roscoe, 58.

**Of the Exclusion of Secondary Evidence, and of the Rule which requires the best Evidence to be given.**

The law excludes such evidence of facts as, from the nature of the thing, supposes still better evidence behind, in the party's possession or power.

**The principle of the rule** under consideration is founded on the presumption that there is something in the better evidence which is withheld, which would make against the party resorting to inferior evidence. Although in some instances, this presumption may not be very strong, yet the general effect of the rule is, to prevent fraud, and to induce parties to bring before a court or jury the kind of evidence which is least calculated to perplex or mislead them. The present rule is satisfied by the production of the best *attainable* evidence. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence of a nature merely substitutionary shall be received when the primary evidence is producible. By substitutionary evidence is meant, such evidence as implies the existence of primary or more original information.

Where there is no substitution of evidence, but only a selection of weaker for stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed; the rule of law does not require the strongest possible assurance of a fact—in other words, it does not require a repetition of evidence beyond that which is sufficient to establish the fact. So if an overt act of mutiny should be witnessed by fifty persons, the law will be satisfied by the production of a part only of the persons present, and one or more would be as sufficient to prove it as the entire number. In

such a case the best possible evidence would have been produced, though not the strongest possible assurance. Sufficient evidence is what the law requires, and not an accumulation of identical evidence; hence the testimony of one credible witness is sufficient to prove a fact, not admitting of further proof, except in cases where the law has designated a different rule, as in the case of false muster, the 15th article of war prescribes two witnesses as necessary to conviction.

In cases where the *privacy of the offence* has excluded the possibility of further proof, and where no facts have been proved to exist, tending to place in doubt the credibility of the complainant, courts-martial have admitted the testimony of the complainant alone, as sufficient for conviction. McArthur* reports a case of a naval lieutenant who was tried on charges preferred by his captain, and among others, for going into the captain's cabin, when *alone* at tea, and calling him *scoundrel* and *liar*. The privacy of the offence excluded all other positive evidence but that of the complainant, which was admitted, and the lieutenant was dismissed the service.

If the law were in every case peremptorily to require two witnesses, this would by no means insure the discovery of truth, but would infallibly obstruct its disclosure, wherever the facts were known only to a single witness. It is therefore held, that there can be no doubt of *the legal sufficiency of one witness to justify conviction*, if the evidence of such witness be entitled to full credit.

The best evidence is distinguished as **primary**—the inferior evidence is usually termed **secondary**, it not being original or primary.

* 2 McArthur, 56.

## PRIMARY EVIDENCE.

**Written Instruments.** As a general rule the contents of a written instrument can only be proved by the production of the instrument itself, parol evidence of them being of a secondary or inferior nature. But this rule is not without many exceptions. In general, whenever there exists a written document, which by the policy of the law is considered to contain the evidence of certain facts, that document is regarded as the best evidence of the facts which it records; and unless it be in the possession of the opposite party, and notice has been given to him to produce it, or it be proved to be lost or destroyed, secondary evidence of its contents is not admissible. This rule is of frequent application in courts-martial with reference to written orders, letters, &c.

Upon the same principle the *records of courts of justice* existing in writing, are primary evidence of the facts there recorded. This rule finds application in military tribunals, where the proceedings of a court of inquiry, for instance, are admitted as evidence before a court-martial.

Although matters of record and proceedings of courts of justice when committed to writing, cannot be proved by parol, they may be *proved by examined copies*, a rule founded upon a principle of general convenience. In the same manner, examined copies of *public* books are admissible without producing the originals. This rule is applicable to office books of an official character when called for before a court-martial. But no such rule exists with regard to private documents, there being no inconvenience in requiring their production.

It may be laid down as a rule, that the *admissions of a party* are competent evidence against himself only in cases where parol evidence would be admissible to establish the same facts, or, in other words, where there is not, in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence, to give any greater effect to confessions or admissions of a party, *unless in open court*, and the tendency would be to dispense with the production of the most solemn documentary evidence. It is not, however, necessary in every case where the fact that is to be proved has been committed to writing, that the writing should be produced. Facts may be *proved by parol*, though a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment without producing the receipt which he took; but parol evidence that a receipt given, acknowledged that the money was in full payment, is inadmissible, when the receipt is in existence and no measures have been taken to procure it. So a person who takes notes of a conversation need not produce them in proving the conversation.

In the case of *printed* documents, all the impressions are originals, or in the nature of duplicate originals, and any copy will be primary evidence.*

**Handwriting.** In proving handwriting, the evidence of third persons is not inferior to that of the party himself. Such evidence is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satis-

* Roscoe, 1–4.

factory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld that the fact to which they speak is not true. If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow that it is equally admissible for the purpose of *disproving* it, the question of *genuine* or *not genuine* being the same in both cases.*

The simplest and most **obvious proof of handwriting,** is the testimony of a witness who saw the paper or signature actually written. But where such a direct kind of evidence cannot possibly be procured, the best which the nature of the case admits is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired a knowledge of his handwriting; for in every person's manner of writing, there is a certain distinct prevailing character which may be discovered by observation, and when once known, may be afterward applied as a standard to try any other specimen of writing whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write, or whether he is acquainted with his handwriting, and his opportunities for becoming so acquainted, and afterward, whether he believes the paper in dispute to be his handwriting. This course of examination evidently involves two questions; first, whether the supposed writer is the person of

* Roscoe, 5.

whom the witness speaks—a question of identity; and, secondly, if he be the person, whether he wrote the paper in dispute—a question of judgment, or a comparison in the mind of the witness between the general standard and the writing produced. All evidence of handwriting, except when the witness has seen the document actually written, is in its nature comparison. It is the *belief* which a witness entertains, upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge.

This kind of evidence, like all probable evidence, *admits of every possible degree*, from the lowest presumption to the highest moral certainty. It may be so weak as to be utterly unsafe to act upon; or so strong as to produce conviction in the mind of any reasonable man. The witness may have been in the constant habit of seeing the person write, day by day, for years together; or he may have seen him write only a few words years ago; or the specimens he saw may have been slight and imperfect, written in a hurry, &c., but whatever degree of weight his testimony may deserve, it is an established rule that if he speaks of handwriting from having seen the person write, he is competent, though he never saw him write but once.

Witnesses will frequently express the weaker degrees of belief in their minds, by saying they are of *opinion*, or they *think;* in such a case the evidence of a witness who has seen a person write is receivable. The language which a witness adopts in such cases varies according to the habits of the individual, and to the want of precision in the terms used for expressing the various degrees of conviction in the mind, and therefore

it is, that the testimony of a witness is held admissible though he may not swear positively to his belief, in words.

**Another method of acquiring a knowledge** of handwriting, is by means of a written correspondence. If a witness has received letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's handwriting. It is essential that the *identity* of the correspondent whose letters have been received with the party whose handwriting is to be proved, should be established, either by the witness who received the letters, or by other reasonable evidence. If this point is clearly proved, the witness will frequently be able to give more satisfactory evidence than one who has seen the person in the act of writing; for the latter may have seen him write but seldom, while the other may have had frequent opportunities of reperusing the letters, and the letters themselves will probably have more consistency, and exhibit a fairer specimen of the general character of the handwriting.

A witness will not be allowed to state his belief as to a piece of handwriting being that of a particular individual, where that belief is the result of a *comparison* of the disputed writing with another written specimen of the same individual produced in court. The best reason for rejecting such a comparison is, that the writings intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best serve his purpose. Besides, if such comparisons were allowed, it would open the door to the admis-

sion of a great deal of collateral evidence, as in every case it would be necessary to go into distinct evidence to prove each specimen produced to be genuine. Upon a question respecting the identity of handwriting, the court may take other papers which have been proved to be the writing of the party—provided they are part of the proofs in the case—and compare them with the disputed writing, for the purpose of forming their opinion whether the disputed writing is genuine. The papers being parts of the *proofs in the case*, are free from all suspicion of undue selection, and the comparison of the court would, in many cases, be a better mode of ascertaining the truth than the evidence of witnesses speaking to handwriting from their memory.

It is a settled rule that where the *antiquity of a writing* purporting to bear a person's signature, makes it impossible for a witness to swear that he has ever seen the party write, it is sufficient that he should have become acquainted with his manner of signing his name, by inspecting other ancient writings which bear his signature, provided these ancient writings have been treated and regularly preserved as authentic documents. A witness is therefore asked whether he has inspected such ancient writings in order to acquire a knowledge of the character of the handwriting; and then, whether he believes the writing in question to be of the same character. These are extraordinary instances arising from the necessity of the case.

When the genuineness of a signature is questioned, the evidence of a witness, who from habit and practice has acquired experience and skill in judging of the genuineness of handwriting, and who states his belief that

a particular writing is in an imitative style and forged, appears to be strictly admissible, although he is not acquainted with the handwriting supposed to be imitated. But many decisions have given little or no weight to such testimony.*

**Proof of Negative, when not Necessary.** In prosecutions where it is necessary to prove that the act with which the prisoner is charged, was done without the consent, or against the will of some other person—as in a charge of absence without leave—it is not in general indispensably necessary to call that person as a witness on the part of the prosecution, in order to prove the negative, namely, that he did not give his consent. It is now settled that the want of consent may be proved in other ways.

**Persons Acting in a Public Capacity.** Where persons acting in a public capacity have been appointed by instruments in writing, those instruments are not considered the primary evidence of the appointment, but it is sufficient to show that they have publicly acted in the capacity attributed to them. And where a party is charged as bearing some particular character, the fact of his having acted in that character, or his admission of the fact, will be sufficient evidence, without reference to his appointment being in writing. Upon a charge of disobedience of orders, it is sufficient to show that in the knowledge of the accused the officer giving the order had previously acted in the capacity of a superior. On a charge of desertion or other military offence, it is sufficient to prove that the accused received the pay, and did the duties of a soldier, without proving his enlistment.

* 2 Phillipps, pp. 595–603.

## SECONDARY EVIDENCE.

If a party intends to use a written instrument, he ought to produce the original if he has it in his possession; he cannot give secondary evidence of writings until all the sources of primary evidence are exhausted. And it is an established rule, that all originals must be accounted for, before secondary evidence can be given of any one. If the instrument is in the possession of the adverse party, there are in general no means of compelling him to produce it, however necessary it may be for the prosecution of the suit or for the defence, and if the party will not produce it, secondary evidence of its contents is then admissible. But before such evidence can be admitted, it must be shown affirmatively that the instrument is in the possession of the adverse party, and also that he has received notice to produce it.*

**Proof of Writing being in Possession of Adverse Party.** The degree of evidence which may be necessary to prove the fact of possession, will depend so much on the nature of the transaction and on the particular circumstances of each individual case, that it is scarcely possible to lay down any general rule on the subject.

Possession is frequently *presumed* from the nature of the paper, as well as other circumstances indicative of its place of custody. The inquiry, in the first instance, may generally be determined by ascertaining to whom the possession rightfully belongs; for in the absence of proof to the contrary, the law will presume that the person entitled holds the custody.

Where a paper is in the hands of a person acting in

* 2 Phillipps, 510.

an independent character, and who has a *right* to the possession of it, notice to the party is sufficient.

Where a document has been traced into the possession of a *party to the case*, it lies upon him to show that he has lawfully parted with it. But this rule does not apply, where the party has voluntarily parted with the possession of a document after having received notice to produce it.

In certain cases, where the written instrument is in the possession of a third person, yet if there is privity between such third person and the party, it is deemed to be virtually in his possession, and therefore a notice to produce given to the party himself, will be sufficient.

**Notice to Produce.** It does not follow, that on proof of the notice the party is compellable to give evidence against himself; or that, if he refuses to produce the paper required, such a circumstance is to be considered as conclusive against him; but the consequence will be, that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents.

The notice to produce should refer to the documents required with sufficient particularity; but if there is no reasonable doubt that the party receiving the notice must have been aware of the particular instrument intended to be produced, that is sufficient.

It is not necessary that a notice to produce should be in writing; and if a notice by parol and in writing be given at the same time, it is sufficient to prove the parol notice alone.

It is sufficient to serve the notice upon the party him-

self, or his counsel, or upon his servant at his quarters. And the notice must be given within a reasonable time —the court deciding whether it has been given within reasonable time or not; and this must depend upon the circumstances of each particular case.

If a party after receiving notice to produce a paper which is in his possession, *refuses* to do so, he places the other party under the difficulty of proving the contents by some secondary proof, and withholds from the court the original and most authentic evidence. He cannot, after this, give in evidence the original, for the purpose of contradicting the secondary proof which has been received.

The regular *time* of calling for the production of papers, is not until the party who requires them has entered upon his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted.*

*Notice to produce*, **when dispensed with.** Where, from the nature of the prosecution, the prisoner must be aware that he is charged with the possession of the document in question, a notice to produce it is unnecessary. So where the prisoner was proved to have said that he had destroyed the document in question, it was held to be unnecessary to prove any notice to produce, so as to let in secondary evidence of its contents. Notice to produce is not required, where the paper offered in evidence is a duplicate original; for in such a case, the evidence offered is primary evidence. However, it seems now to be the better opinion, that neither party will be allowed, either in the examination in chief or in

* 2 Phillipps, 520–538. Roscoe, 9–11.

cross-examination, to inquire into the contents of a document, merely because the opposite party has the original in his possession in court at the time of the trial, and declines to produce it; and that the opposite party may object to such parol evidence of the contents, on account of his not having received a previous notice to produce the original.

Where a writing is from its nature not capable of being transported from place to place, as in the case of *inscriptions* or notices fixed on walls, tombstones, boards and the like, secondary evidence of the inscription will be received. But the principle of this exception only applies to cases where the writing is a fixture. So where a *document* is of a public nature, a copy of it is evidence; the production of the original is dispensed with on the ground of inconvenience, and on the fact that the easy detection of fraud diminishes the probability of it.

Secondary evidence is also admissible of writings which are proved to have been *destroyed*, or which cannot be found after due inquiry. What shall be considered due inquiry must depend on the particular circumstances of the case, especially upon the importance of the instrument and the usage or practice which may exist respecting the custody of such documents.

The question as to the *sufficiency of the search* being preliminary to the admissibility of the secondary evidence, it must be shown, in general, that there has been a diligent search made, such as the case naturally suggests; and the search must appear to have been made in the proper place—the place where the paper was likely to be found.

In the case of a *useless document*, the presumption is

that it has been destroyed. And where the loss or destruction of a paper may almost be presumed, very slight evidence of such loss or destruction is sufficient. Proof by witness that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in secondary evidence.

Where a person has *interest* in destroying a paper, its destruction will be presumed on very slight testimony. The law, it has been held, presumes that an accomplice will destroy a letter serving to implicate him as such.

When it is the duty of the party in possession of a document to *deposit* it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed.

When the paper was in the possession of a *party who is dead*, his declarations as to its loss or destruction, are admissible after his death. When the party in whose possession the instrument was, is alive, his declarations are inadmissible, and he ought to be called as a witness.

As to *degrees of secondary evidence*, it is held that when the original is lost and there is a counterpart, the latter should be accounted for before inferior evidence is admissible. But after the loss of the different parts are proved, or these are shown to be unattainable, then examined copies, or the parol evidence of witnesses, may be resorted to.*

## PRESUMPTIVE EVIDENCE.

We have thus far considered some of the general rules which have been adopted in courts of law relative to the exclusion of evidence. It is now proposed to treat

* 2 Phillipps, 550–568; Roscoe, 12, 13; Starkie, 439.

of the nature or quality of evidence; more especially with regard to *presumptive* or *circumstantial* proof, as contradistinguished from *direct* proof.

**Definition.** Where the facts proved are not the precise facts in issue, and the court is to come to a conclusion upon the facts in issue by an act of reasoning from those other proved facts, the evidence in such a case is said to be *presumptive.*

A presumption of a fact is properly an inference of that fact from other facts that are known. When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact, and these are called *presumptions* and not *proofs;* for they stand instead of the proofs of the fact till the contrary be proved. Where a man is discovered suddenly dead in a room, and another is found running out in haste with a bloody sword, it is a violent presumption that he is the murderer, for the blood, the weapon, and the hasty flight, are all the necessary concomitants of such facts; and the next proof to the sight of the fact itself is the proof of those circumstances that usually attend such facts. The circumstances should be strong in themselves, should each of them tend to throw light upon, and to prove each other, and the result of the whole should be to leave no doubt upon the mind that the offence has been committed, and that the accused and no other could be the person who committed it. That the fact to be inferred *often* accompanies the fact proven is not sufficient; it should *most usually* accompany it; and it might be said, in the absence of all circumstances, that it should *rarely* otherwise happen.

The force of presumptions is almost intuitively perceived by mankind; and that principle of the mind which prepares it to expect the future association of circumstances, because it has been accustomed to find them associated, cannot be accounted for, except by setting it down as imposed upon us by the law of nature.

**What circumstances will amount to proof** can never be matter of general definition. The legal test is, the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty, is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt. Even direct and positive testimony does not afford grounds of belief of a higher and superior nature. The rule even in a capital case is, that should the circumstances be sufficient to convince the mind and remove every rational doubt, the jury is bound to place as much reliance on such circumstances as on direct and positive proof.

With respect to the *comparative weight* due to direct and presumptive evidence, it has been said that circumstances are in many cases of greater force and much more to be depended on than the testimony of living witnesses; inasmuch as witnesses may either be mistaken themselves, or wickedly intend to deceive others; whereas circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie. But it must be observed that circumstantial evidence, besides the possibility of its being perverted through the means of witnesses in like manner as direct evidence, is subjected to this additional infirmity, that it is composed of infer-

ences each of which may be fallacious. As a general principle it is certainly true, that positive evidence of a fact from credible eye-witnesses is the most satisfactory that can be produced, and the universal feeling of mankind leans to this species of evidence in preference to that which is merely circumstantial.

Besides presumptions of fact, which suppose in each case an independent act of reasoning, there are certain *presumptions of law*, which will stand good until the contrary is proved. The law presumes a man to be innocent, until the contrary is proved or appears from stronger presumption. And it is a rule that illegality is never to be presumed, but the presumption is that a party complies with the law.

There is a **general presumption** in criminal matters, that a **person intends** whatever is the natural and probable consequence of his own actions. And it seems to be clearly a presumption of law, that where an act is done by one person injurious to another, malice—that is, an attempt to injure—is *prima facie* to be presumed in the person doing the act. Thus, in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily established by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to be founded in malice unless the contrary appears.

In almost every criminal case, a portion of the evidence laid before the jury consists of the *conduct of the party at the time of*, or after being charged with, the offence. Great caution should be exercised in weighing the effect of such presumptive evidence; for an innocent

man, finding himself in a situation of difficulty, and perhaps, from the circumstances of the case, of danger, is sometimes induced to adopt a line of conduct which bears with it a presumption of guilt. Flight may be very strong evidence of guilt, or it may weigh nothing, according to the circumstances under which it takes place. The legal presumption from flight is against the prisoner, and it lies upon him to rebut it.*

The general rules which will now be adverted to are:

*First*, That the evidence must be confined to the points in issue;

*Secondly*, That the point in issue must be proved by the party who asserts the affirmative; and

*Thirdly*, That the substance only of the issue need be proved.

**First.—Evidence confined to the Issue.**

In criminal proceedings, there is the strongest necessity for the strict enforcement of this rule; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the charge. This rule is founded in common justice, for no person can be expected to answer, unprepared and at once, for every action of his life. Notwithstanding the fact, that the sole object of receiving evidence is to establish the truth, yet there is sometimes much difficulty in deciding correctly what particular testimony should be admitted or rejected. It may be admissible in one point of view, though not in another, and as it is frequently difficult to ascertain, *a priori*, whether proof of a particular fact offered in evi-

* 1 Phillipps, 598–613; Starkie, 514; Roscoe, 15–20.

dence will or will not become material, the usual practice of courts in such cases is, to give credit to the assertion of the party who tenders such evidence, that the fact will turn out to be material.

It is hardly necessary to observe, that though a circumstance be proper as tending to show a particular fact, it is *inadmissible* unless the fact itself be pertinent to the question in issue.

It should also be remembered, that under the head of **relevancy** the question is not whether the evidence offered be the most convincing, but whether it tends at all to illustrate the question; and though an inquiry may be irrelevant on the examination in chief, it may be afterward rendered proper and necessary by the course of a cross-examination. An inquiry into other facts besides those charged, may often be totally irrelevant; at other times they bear on the point in issue, and constitute presumptive proof. In support of a charge for malicious or disrespectful language addressed to a commanding officer at a stated time, or in a particular letter; after the words charged have been proved, the prosecutor may prove also that the accused spoke or wrote other disrespectful or malicious words on the *same subject*, either before or afterward, or that he published or disseminated copies of the letter set forth as disrespectful in the charge. This evidence is admissible, not in aggravation of the crime charged, but for the purpose of proving deliberate malice or disrespect, which motives are imputed in the charge.* On a trial for high treason, it being proved that the prisoner had enlisted into the enemy's army, his unsuccessful attempt

* Simmons, 405.

to persuade another to enlist was allowed in evidence, as showing the *quo animo*.

On a court-martial the prosecution is not permitted under any circumstances to examine as to general habits, for the purpose of showing that the accused has a *general disposition* to commit the same kind of offence as that charged against him. It is most obvious that character not connected with the charge, cannot be admitted to weigh in the scale of evidence as to the *finding* of the court.

**Character.** Where intention is a principal ingredient in the charge, or where circumstantial proof only is adduced, evidence as to character bearing on the charge, may be highly important. An affectionate and warm evidence of character, when collected together, should make a strong impression in favor of a prisoner, and when those who give such a character in evidence are entitled to credit, their testimony should have great weight with the court. On a charge of murder, where malice is essential, expressions of good-will and acts of kindness on the part of the prisoner toward the deceased, are always considered important evidence, as showing what was his general disposition toward the deceased, from which it may be concluded that his intention could not have been what the charge imputes. On a charge of theft, character for honesty may be entitled to great weight. So also on a charge implicating the courage of a soldier, character for bravery and resolution might be of vast importance; but it would be manifestly absurd and irrelevant, when deliberating on a charge of theft, to allow character for bravery to weigh in the scale of proof; or, when deciding on a charge of cow-

ardice, to be biased by a character of honesty. The inquiry in such particular cases, ought manifestly to bear some analogy and reference to the charge against him.

**General character** is the estimation in which a person is held in the community where he has resided. Public opinion is the question in common cases where character is in issue, character and reputation being the same. General character, unconnected with the charge, though it must be inoperative with the court except as to determining the nature of punishment in discretionary cases, may most essentially serve the prisoner, by influencing the superior in whom the power to mitigate or remit the sentence is vested. And it has ever been the practice of courts-martial to admit evidence as to the prisoner's character, *offered by him*, immediately after the production of his witnesses to meet the charge, whatever be its nature; though questions by the accused tending to elicit such, may be frequently made in the course of the investigation. A prisoner is even permitted to put in proof particular instances wherein his conduct may have been publicly approved by superior officers.* Mere letters of recommendation would not be evidence, nor would certificates prepared for the occasion be; instead of such letters, the law requires testimony on oath, whether delivered orally in open court or by depositions. Nor indeed, as to that, would *ex-parte* affidavits be competent. But official letters, which may have been received at the termination of a particular service or tour of duty, are a part of the *res gestæ*, and are admissible, subject, of course, to explanations.†

* Simmons, p. 411. † Attorney-general's opinions, January 31st, 1857.

The good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the court, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be to leave the court-martial to form their conclusion upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer. Still, in a clear case, good character will be of no avail in the finding. It is only in cases of doubt that such proof is entitled to weight.

Evidence will *not be admitted*, on the part of the prosecution, to show the bad character of the accused, unless he has called witnesses in support of his character; and even then the prosecutor cannot examine to particular facts.

Witnesses as to character may be asked to state their opportunities, or means, of forming an opinion as to the prisoner's character.

**Mutiny and Sedition.** On a prosecution for a crime, the proof of which is supposed to consist wholly, or in part, of evidence of a conspiracy entered into by the accused, so that the conspiracy is to be given in evidence against him, general evidence of the existence of the conspiracy charged must be received in the first instance, though it cannot affect the accused unless brought home to him or to his agent.

Upon the trial of a charge of mutiny, or intended

mutiny, it is important to know how far the acts or declarations of co-mutineers in furtherance of a concerted plan, may be received in evidence against a particular individual. Proof of the plot or combination must precede proof of declarations made by either of the alleged parties, though the conduct, acts, and declarations of the separate parties in the planning or execution of the scheme, may be shown as evidence of the common design. In other words, general evidence may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the accused was a guilty participator in the crime. It is very obvious that the rules of evidence on trials for treason and conspiracy before courts of civil judicature, will apply most aptly and closely to trials before courts-martial for mutiny and sedition.

The *existence* of the conspiracy may be established, either by evidence of the acts of third persons, or by evidence of the acts of the prisoner, and any other with whom he is attempted to be connected, concurring together at the same time and for the same object. It has recently been held that the prosecutor may either prove the conspiracy which renders the interests of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. The evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually from the very nature of the case, circumstantial; and the evidence is more or less strong, according to the publicity or privacy of the object of such concurrence, and the greater or less degree of similarity in the means employed to effect it. The more secret the one, and the

greater the coincidence in the other, the stronger is the evidence of conspiracy.*

In prosecutions involving a charge of conspiracies, it is **an established rule** that where several persons *are proved* to have combined together for the same illegal purpose, any *act* done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party; it follows, therefore, that any writings or verbal expressions—being acts in themselves, or accompanying and explaining other acts, and so being part of the *res gestæ*, and which are brought home to one conspirator—are evidence against the other conspirators, provided it sufficiently appear that they were used in the furtherance of a common design.

In like manner consultations in furtherance of a conspiracy are receivable in evidence, as also letters or drafts of answers to letters, and other papers found in the possession of co-conspirators, and which the jury may not unreasonably conclude were written in prosecution of a common purpose, to which the prisoner was a party. For the same reason declarations or writings explanatory of the nature of a common object, in which the prisoner is engaged together with others, are receivable in evidence; provided they accompany acts done in the prosecution of such an object, arising naturally out of these acts, and not being in the nature of a subsequent statement or confession of them.

But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation or narrative of some part of the transaction, or as to the

* Roscoe, pp. 415–417.

share which other persons have had in the execution of a common design, the evidence is not within the principle above mentioned: it altogether depends on the credit of the narrator, who is not before the court, and therefore it cannot be received.

It is in consequence of the *distinction* between writings or declarations which are a part of the transaction, and such as are in the nature of subsequent statements but not part of the *res gestæ*, that the admissibility of writings often depends on the *time* when they are proved to have been in the possession of co-conspirators, whether it was before or after the time of the prisoner's apprehension. Thus, some papers containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner; inasmuch as there was in the case strong presumptive evidence that they were in the house of the co-conspirator, *before* the prisoner's apprehension: for the room in which the papers were found had been locked up by one of the conspirators. The point in this case was distinguished from a point in a previous case, where the papers were found *after* the prisoner's apprehension, in the possession of persons who, possibly, might not have obtained the papers till afterward.

In a prosecution against several persons for conspiracy in unlawfully assembling for the purpose of exciting discontent and disaffection, the **material points for consideration** are, the general character and intention of the assembly, and the particular case of the prisoners as connected with that general character. With this

view, it would be relevant to produce in evidence certain resolutions proposed by one of the prisoners at an assembly recently held at another place, for the same professed object and purpose as were avowed by the meeting in question, and that the defendant acted in both cases as chairman. In a question of intention as this is, it would be most clearly relevant to show against that defendant, that at a similar meeting held for an object professedly similar, such matters had passed under his immediate auspices.

Much evidence is usually produced upon such trials, which *does not relate* to the particular conduct of a prisoner. Thus the acts and declarations of other conspirators in the absence of the prisoner are admissible against him; and the prisoner may be affected by writings from other persons, which came into his custody before his apprehension. In these cases, the evidence is of a direct nature, applying to the acts in furtherance of a conspiracy, and not circumstantial, as proving only collateral circumstances from which these acts are to be inferred.

As whatever the prisoner may have done or said at any meeting, alleged to have been held in pursuance of the conspiracy, is admissible in evidence against him on the part of the *prosecution;* so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved in his behalf: for the intention and design of the party at a particular time, are best explained by a complete view of every part of his conduct at that time. Should other acts of the prisoner, besides those charged, be proved against him for the purpose of showing his design in the affair in question, it

seems reasonable that he should be allowed to explain those acts by proof of other *cotemporaneous* particulars of his conduct, which show that he had a different design from that imputed to him.*

**Secondly.—Onus Probandi—Burden of Proof.**

It is a general rule of evidence, established for the purpose of shortening and facilitating investigations, that the point in issue is to be proved by the party who asserts the affirmative, that is, the affirmative in substance, not in mere form. This rule arises also from the difficulty, amounting in many cases to an impossibility, of proving a negative. Upon the party who has to give such proof, is said to rest the burden of proof, or, as it is technically called, the *onus probandi.*

One of the **surest tests** for ascertaining upon which side the affirmative really lies, is to consider which party would be successful if no evidence at all were given. Thus, where one party charges another with a culpable omission or breach of duty, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice, that where a party stands charged with an offence, his innocence is presumed, and the onus is upon the prosecutor.

The necessity of proving the negative must be often subject to the rule, that the burden of proof lies on the person who has to support his case by proof of a fact which lies more peculiarly within his own knowledge, and of which he is supposed to be cognizant. Thus, in an action of penalties under the game laws, though the plaintiff must aver, in order to bring the defendant

* 1 Phillipps, 205–209, and 773–776.

within the act, that he was not duly qualified, yet it is not necessary to disprove his qualification, but it will be for the defendant, if he can, to prove himself qualified. If such negative evidence were necessary to support the information, it would scarcely be possible in any case to convict; on the other hand, such qualification is peculiarly within the knowledge of the qualified person.

These rules were thus laid down by Judge Story:* "If the charge consists in a criminal neglect of duty, as the law presumes the affirmative, the burden of proof of the contrary is thrown on the other side. But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative."

Upon a *question of jurisdiction*, where the proceedings of a court of general jurisdiction are alleged, the law presumes jurisdiction, and the onus of proving the contrary lies with the party who undertakes to question it. But with respect to courts of limited and special jurisdiction, it is widely different; nothing is presumed in favor of their jurisdiction, and the party seeking to derive advantage from their proceedings is bound to show jurisdiction affirmatively.†

**Thirdly.—The Substance only of the Issue need be proved.**

Under the present head will be considered, the *quantity* of evidence required in support of particular averments in charges, and, consequent thereupon, the doctrine of *variances*.

A general rule, governing the application of evidence

* United States *vs.* Hayward, 2 Gall, 284. † 1 Phillipps, 809–822.

to the points in dispute on any issue, is that it must be sufficient to prove the substance of the issue. And the greater number of cases on this subject may be classed under the two heads of *divisible* and *descriptive* averments.

**Divisible Averments.**

**Sufficient to prove what constitutes an Offence.** It is a universal principle, which runs through the whole of the criminal law, that it will be sufficient to prove so much of the indictment as charges the defendant with a substantive crime therein specified. The offence, however, of which he is convicted must be of the same class with that with which he is charged.

On courts-martial, a prisoner charged with desertion may be found guilty of absence without leave, for absence is the principal matter in issue, the motive and design being concomitants.

On a charge of offering violence to a superior officer in the execution of his office, by discharging a loaded musket at him, the prisoner may be convicted of offering violence, and a proportionate punishment may be awarded for such conduct, although the evidence fail in establishing that the rank or authority of the superior officer was known to the offender, or although the capital offence under the articles of war may not have been committed in consequence of the superior officer not having been in the execution of his office at the time. The principal matter is the *offered violence*, the rank and office of the person fired at being circumstances in aggravation.*

Where a charge alleges that the accused *did*, *and*

* Simmons, 416.

*caused to be done* a certain act, it is sufficient to prove either one or the other.

**Intent.** Where the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only.

**Descriptive Averments.**

Where a person or thing, necessary to be mentioned in an indictment, is described with circumstances of greater particularity than requisite, yet these circumstances must be proved, otherwise it would not appear that the person or thing is the same as that described in the indictment. Thus, in an indictment for coining, alleged possession of a die made of iron or steel; in fact, it was made of zinc and antimony. The variance was held fatal.

And it has also been held that an allegation in an indictment, which is not impertinent or foreign to the cause, must be proved; though a prosecution for the offence might be supported without such allegation.

**Name of Party Injured.** The name, both Christian and surname, of the person upon whom the offence is charged to have been committed, is matter of description and must be proved as laid; but if the name be that by which he is usually called and known, it is sufficient. Where there are a father and a son of the same name, and that name is stated without any addition, it shall be *prima facie* intended to signify the father; though it may be proved that either the father or son was the party intended.

It is not necessary that there should be any *addition*

to the name. Where a person has a name of dignity, he ought to be described by that name, and as it forms part of the name itself and is not an addition merely, it must be proved as laid.

Where a name which is material to state, is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient. Thus, where the name in the indictment was *John Whyneard*, and it appeared that the real name was *Winyard*, but that it was pronounced *Winnyard*, the variance was held to be immaterial. But *McCann* for McCarn is a fatal variance.

**Names of Third Persons.** Not only must the names descriptive of the prosecutor or party sustaining the injury be strictly proved, but where the name of a third person is introduced into the indictment as descriptive of some person or thing, that name also must be proved as laid. When surnames, with a prefix to them, are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient. Where the name of a third person is stated in an averment, unnecessarily introduced, and which may therefore be rejected as surplusage, a variance will not be material.

**Mode of Committing Offences.** In general the descriptive averments of the mode in which an offence has been committed, do not require to be strictly proved, if, in substance, the evidence supports the allegation. Thus, in murder, it is always sufficient, if the mode of death proved agree in substance with that charged. Therefore, though where the death is occasioned by a particular weapon, the name and description of the weapon must be specified; yet, if it appear that the party was killed by a different weapon, it maintains the

indictment; as if a wound or bruise be alleged to be given with a sword, and it prove to be with an axe or staff, this difference is immaterial. And the same if the death be laid to be by one sort of poisoning, and in truth it be by another. When the indictment was for assaulting a person with a certain offensive weapon, commonly called a *wooden staff*, and it was proved to have been with a *stone*, it was held well, for the two weapons produce the same sort of mischief, viz.: by blows and bruises. Though the weapon need not be proved to be the same, yet it must appear that the species of killing was the same. Thus, if the prisoner be indicted for poisoning, it will not be sufficient to prove a death by shooting, starving, or strangling.

**Persons Committing the Offence.** So also with regard to the person by whom the offence is committed, it is sufficient to charge him with that which is the legal effect of the act which he has committed. Therefore, where an indictment charges that A gave the mortal stroke, and that B and C were present aiding and abetting, if it appeared in evidence that B was the person who gave the stroke, and that A and C were present aiding and abetting, they may all be found guilty of murder or manslaughter, as circumstances may vary the case. The identity of the person supposed to have given the stroke is but a circumstance, and in this case a very immaterial one—the stroke of one being in consideration of law the stroke of all. The person giving the stroke is no more than the hand or instrument by which the others strike.

**Averments not Material.** The general rule with regard to immaterial averments has been thus stated: if

an averment may be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence; as, where the name of a person or place is unnecessarily introduced, it need not be proved.

**Averments as to Time.** It is a rule that it is not necessary to prove the time precisely as laid, unless that particular time is material or forms an ingredient of the offence itself. This is the constant course of proceeding in criminal prosecutions from the highest offence to the lowest; although every material fact must be alleged in the indictment to have occurred at a certain time.

Simmons* cites the case of a soldier who was tried for having deserted on the 19th October, 1833, when in fact he had deserted on the 19th October of the preceding year, but was still illegally absent on the date mentioned in the charge. The court was recommended by the then judge advocate general to come to a specific finding, stating the facts which appeared in evidence as above detailed, and to find the prisoner guilty of the charge, with the exception of so much of it as imported that he deserted on or about the particular date mentioned.

Upon the case of a soldier who was proved to have committed the offence laid to his charge, but not upon the day specified, the judge advocate general remarked that "it was perfectly competent to the court to find the prisoner guilty under the charge so framed, although the offence was proved to have occurred on a different day, but that in such case it was in strictness the duty

* Page 423.

of the court to specify in their finding on what day the offence took place."

**Averments as to Place.** On the trial of offences before the ordinary courts of law, it is sufficient to prove that the offence was committed in the county in which it is laid to have been committed, and a mistake in the particular place in which an offence is laid will not be material. And although the offence must be proved to have been committed in the county where the prisoner is tried, yet after such proof the acts of the prisoner in any other county, tending to establish the charge against him, are admissible in evidence.*

This rule is fixed in this country by the constitution, which directs that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law.† In trials by courts-martial no such limitation has been fixed, as regards *place*, and therefore such courts have a jurisdiction co-extensive with the country; and a crime committed in one geographical department may be tried in any other. Their jurisdiction, then, only depends upon the *person* offending and upon the *offence* charged.

It is nevertheless necessary that the *place* where the offence is supposed to have been committed should be laid with certainty, and this because such allegation may, at times, be essential to the defence of the accused; but a variance between the proof of the place where the crime was committed and the place as laid in the charge, should not of necessity acquit the prisoner; it is held

* Roscoe, pp. 98–110. † VIth Amendment.

sufficient to identify the accused with the perpetration of the offence. A soldier accused of deserting the service from one place, on the 1st day of June, but who on trial was clearly shown to have deserted on the specified day from a different place, would justly be convicted; for the essence of the crime is made out, and the place whence he deserted makes no part of the offence, but is a mere circumstance of description. But if the evidence exhibited the time and place as so variant from those stated in the charge, that there was a possibility of the prisoner having repeated the offence, he would certainly be acquitted, because the act charged and the act proved are distinct offences.*

To lay the *place* in a charge, enables the accused to prove an *alibi*. When a prisoner is charged with committing an offence, and he can show his absence from the particular place at the time, he is said to prove an alibi. Before courts-martial such a defence does not avail, where the crime is clearly made out to have been committed by him at the time stated, although at a different place, for the place has been wrongfully stated—the crime and criminal clearly proved. But where the crime and place, and not the criminal, have been put in proof, the prisoner may prove an *alibi* by showing that at the time of the commission of the offence at that place he was at another place. This would acquit him.

## EXAMINATION OF WITNESSES.

Witnesses at courts-martial are invariably examined in open court in the presence of each member, and of the parties to the trial. The court is thereby enabled

* De Hart, pp. 367, 368.

to observe their demeanor, inclination, and understanding; points essential to the formation of a correct judgment as to the value of their testimony. The adverse party is also afforded an opportunity of objecting to their competency, or of trying their credibility by cross-examination.

On courts-martial no witness is *permitted to be present* during the examination of another, to prevent the influence which the testimony given by one may tend to produce in another, and also to render collusion difficult between them. In general, the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court, and this right may be exercised at any period of the trial. This rule does not extend to the counsel, who, upon the request of the prisoner, may remain and still be examined as a witness, his assistance being necessary to the proper conduct of the defence. A surgeon—or other professional person—who is called to give an opinion as a matter of skill, upon the circumstances of the case, may be allowed to remain in court during the trial till the *medical* opinion of other witnesses begins. If a witness should remain in court or return to it after being directed to withdraw, it is for the court to decide as to the admission or rejection of his testimony. If admitted, the circumstance may affect his credibility.

It is almost a matter of right for the opposite party to have a witness out of court, while a discussion—legal argument—is going on as to his evidence.

It is competent to a court-martial to *confront* any two or more adverse witnesses, that is, to call into court at the same time, any two or more contradictory witnesses,

and to endeavor to reconcile their testimony by reading over to each the evidence of the other, and by requiring an explanation of such parts as are inconsistent or contradictory, in order to ascertain as far as possible the real truth of the case; but this proceeding would not be advisable, till the close of the cross-examination.*

A *member* of a court-martial, as a judge or juror, is a competent witness, and may be sworn to give evidence in favor or against a prisoner, at any stage of the proceedings; it is, however, to be avoided, if foreseen. It need scarcely be observed, that no communication by a member in closed court, can be received; he must be sworn as other witnesses, in open court, and be subject to cross-examination; neither ought the private knowledge of any fact to influence the particular verdict of a member, for he is sworn to well and truly try and determine, strictly according to the evidence before the court, and not according to the evidence concluded in his own breast.

It is a question frequently agitated, whether or not courts-martial are competent to *originate evidence;* that is, to call into court a witness not produced by the parties before the court. There is no doubt but that the court may, at any period of the trial, recall any witness for further examination, if any question occur to the court or is suggested by either of the parties; and it would also seem that the custom of the service would justify the calling, as a witness, any individual alluded to in the evidence before the court, who may be at hand, and whose examination might afford a probability of elucidating a special point which may be dubious; but

* Adye, 101.

it is apprehended that this is the utmost extent to which a court would be authorized to go.*

The *proper time to object* to the competency of a witness, is when he is called, and before being sworn, but objections to his competency never come too late, but may be made in any stage of the case. Still, a party who is cognizant of the interest of a witness at the time he is called, is bound to make his objection in the first instance; he must make it as soon as the interest is discovered and he has an opportunity of doing it; otherwise he will be considered as having waived the objection.

The strict and regular *method of raising an objection* to the competency of a witness, is by examining him on the *voir dire;* that is, he should be sworn to answer all such questions as the court shall demand of him—his statement on such examination not being evidence in the case pending. The examination of the witness in the cause may be stopped at any time, in order that he may be sworn upon the *voir dire* and examined as to his competency; yet this formal proceeding is not necessary, and if it should appear, while the witness is still under examination, that he is incompetent, the objection may be taken, and his testimony excluded or stricken from the case.

Where the supposed incompetency arises from defect of understanding, as in the instance of lunatics, idiots, &c., or from defect of religious principle, as in the case of atheists, young children, &c., inasmuch as the very ground of incompetency assumes that the proposed witness has no perception of the obligation of an oath, it

* Simmons, 464.

follows that the preliminary inquiry upon the *voir dire* cannot be upon oath.

The *objection* to a witness's competency *may be supported*, either by the examination of the witness or by independent evidence, and it rests upon the party objecting, to prove the incompetency of the witness. Where you resort to the *voir dire* you are concluded; and if you fail to show incompetency in this mode you cannot do it by other evidence of any kind, in the course of the same trial. So if you inquire of the witness as to his interest, on his general oath, this is equivalent to an inquiry upon the *voir dire*, and equally prevents a resort to any other mode. If you have attempted to show incompetency by evidence derived from any other source than the witness, you shall not afterward put him on his *voir dire*. But where you have failed in your attempt by other testimony to show one set of facts upon which you rely for incompetency, you may still show his interest on another set of facts, even on his *voir dire*.

When the objection arises from a witness's examination on the *voir dire*, the *objection may be removed* by the statement of the party himself on further examination. But where the party calling a witness attempts to remove the objection, not by a further examination of the witness, but by other independent proof, he will be subject to all the ordinary rules of evidence.*

**Order of Examination.** When a witness has been regularly sworn, he is first examined by the party who produces him; after which the other party is at liberty to cross-examine; and then the party who first called him may re-examine. This closes the examination of

* Phillipps, 104.

the witness. The office of the examination in chief is, to lay before the court the whole of the information of the witness that is relevant and material; the office of cross-examination is, to search and sift, to correct, and supply omissions; the office of re-examination, to explain, to rectify, and put in order

**Examination in Chief.** On the examination in chief of the witness, you are bound at your peril to ask all material questions in the first instance; and if you omit this, it cannot be done in reply. No new question can be put in reply unconnected with the subject of the cross-examination, and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination in chief, the usual course is to suggest the question to the court, which will exercise its discretion in putting it to the witness.*

*Leading questions*, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief, as the witness is supposed to be in the interest of that party. A question to a witness is leading, which puts into his mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. Putting it in the alternative form, as whether or not a party did a certain act, specifying it, does not remove the objection to a question being leading, and it is a mistake to suppose such only is a leading question, to which *yes* or *no* would be a conclusive answer. The pernicious influence of leading questions is most felt, and most to be feared, when the object of an inquiry is to ascertain the details of a conversation, admission, or agreement; and more

* Starkie, 150.

rigor is, in such cases, justified in confining the direct examination to its appropriate rules.

Questions which are merely introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the case, are not liable to the objection of leading. Where an omission is caused by want of memory, a suggestion may be permitted to assist it.

The general *rule is relaxed*, wherever it clearly appears that the witness is hostile, or that a more searching mode of examining him is necessary to elicit the truth. In such cases, the court may deem it right to allow the examination in chief to assume something of the form of cross-examination—and how far this may be by leading questions rests entirely in the discretion of the court.

It seems doubtful *to what extent* leading questions may be put in an examination in chief, when the object is to prove that another witness, examined on the opposite side, has on some former occasion made a different and contradictory statement. The most unexceptionable and proper course appears to be, to ask the witness who is called to prove a contradictory statement made by another witness, what that other witness said relative to the transaction in question, or what account he gave, and not in the first instance to ask in the leading form, whether he said so and so, and used such and such expressions.*

**Cross-examination.** The power of cross-examination is generally allowed to afford one of the best securities against incomplete, garbled, or false evidence; great lati-

* 2 Phillipps, 888–895.

tude, therefore, is allowed in the mode of putting questions. *Leading questions* are admitted, in which larger powers are given to the examining party than in the original examination. The form of a cross-examination, however, depends in some degree, like that of an examination in chief, upon the bias and disposition evinced by the witness under interrogation. If he should display a zeal against the party cross-examining him, great latitude with regard to leading questions may with propriety be admitted. It has been held that you may put a leading question to an unwilling witness on the examination in chief, at the discretion of the court, but you may always put a leading question in cross-examination, whether a witness be unwilling or not. But in this latter case, the witness cannot be asked a leading question in respect to new matter, the same rules holding as on the examination in chief.

*Irrelevant* questions will not be allowed to be put to a witness on cross-examination, although they relate to facts opened by the other party but not proved in evidence. Nor can a witness be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matters in issue, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. And if the witness answers such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterward be admitted to contradict his testimony on the collateral matter.

Counsel cannot assume that a witness has made a statement on his examination in chief, which he has not made; or put a question which assumes a fact not in proof.

Where a witness is called merely to produce a document, which can be proved by another, he is not subject to cross-examination. But where the party producing the document is sworn, the other side is entitled to cross-examine him, although he is not examined in chief. So where a witness has been asked only one immaterial question, and his evidence is stopped, the other party has no right to cross-examine him. Where a witness is sworn and gives some evidence, if it be merely to prove an instrument, he is to be considered a witness for all purposes.

It is not admissible in cross-examination to represent the *contents of a letter*, and to ask a witness whether he wrote such a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and his admitting that he wrote such a letter; a witness may, however, be asked what a party to the trial has said as to the contents of a paper, without producing it. One or more lines of a letter may be shown to a witness, and he may be asked whether he wrote such part of a letter; but if the witness deny that he wrote such part exhibited, he cannot be examined as to the contents of the letter. If a witness admits a letter to be of his handwriting, he cannot be questioned whether statements, such as may be suggested, are contained in it; the whole letter must be read in evidence.*

**Re-examination.** A re-examination, which is allowed only for the purpose of explaining any facts which may come out in cross-examination, must of course be confined to the subject matter of the cross-examination. It

* Simmons, p. 478.

is not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief, but must be confined to questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions.

**Memorandum to Refresh Witness's Memory.** A witness may refer to an informal memorandum taken down by himself, in order to refresh his memory. So he may refer to any entry or memorandum he has made shortly after the occurrence of the fact to which it relates, although the entry or memorandum would not of itself be evidence. At present, however, the case would seem to warrant the statement, that, generally, an original memorandum made by the witness presently after the facts noted in it transpired, and proved by the same witness at the trial, may be read by him, and is evidence to the court of the facts contained in the memorandum, although the witness may have totally forgotten such facts at the time of the trial.* So where a witness testifies that he was present at a conversation and made a memorandum of it immediately after it took place; that he had now no recollection of all the particulars, but that he had no doubt that the facts stated in the memorandum were true; and that he should have sworn to them from recollection within a short time afterward—the memorandum was admitted in evidence, in connection with his testimony, to show the particulars of the conversation.

* 2 Phillipps, p. 918.

But a witness cannot refresh his memory by extracts from a book, though made by himself; or from a copy of a book; for the rule requiring the best evidence makes it necessary to produce the original, though used only to refresh the memory. Where a witness on looking at a written paper has his memory so refreshed that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. Where the witness cannot speak without referring to a book, the book must be produced in court. If produced the other party has a right to see it, and cross-examine from it. If he cross-examines to other entries than those referred to by the witness, he makes them part of his own evidence.*

## PRIVILEGE OF WITNESS IN REFUSING TO ANSWER.

1. **Where the Answering might subject him to a Criminal Charge, &c.** A witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. He is exempted by his privilege from answering not only what will criminate him directly, but also what has any tendency to criminate him; and the reason is, because otherwise question might be put after question, and though no single question may be asked which directly criminates, yet enough might be got from him by successive questions whereon to found against him a criminal charge. In Burr's trial the rule was finally thus stated by Chief-Justice Marshall: "It is the province of the court to judge whether any direct

* Roscoe, p. 170.

answer to the question which may be proposed, will furnish evidence against the witness. If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such case, the witness must himself judge what his answer will be; and if he say on oath that he cannot answer, he cannot be compelled to answer." The privilege of refusing to answer is the privilege of the witness, not of the party. It belongs to the witness on a principle of natural justice. The right to refuse to answer in such cases is a right of self-defence; if he has a right to defend himself against a criminal charge, he must have a full right not to expose himself to such a charge by giving evidence, and not to be accessory to his own ruin. The court, therefore, always feels it to be its duty to apprise a witness of his privilege, as soon as a question is asked which may place him in danger.

Whether questions, the answers to which would expose the witness to punishment, ought not to be *allowed to be put*, or whether the witness ought merely to be protected from *answering* such questions, does not appear to be settled. Upon principle it would seem that questions tending to expose the witness to *punishment*, may be *put*, as well as questions tending to degrade his character. The ground of objection in the first case is, not that the question has a tendency to degrade him, but that advantage may be taken of his answer in some future proceeding against him, and the rule that no person is bound to accuse himself is urged. This objection is however completely removed by permitting the

witness not to answer the question, for his silence would not in any future proceeding be any admission of guilt. The question may then be regarded as one simply tending to degrade the witness, and would come within the rule which appears to be now well established, that it may be *put*, though the witness is not compellable to give an answer, or that if he does give an answer, the party examining him must be satisfied with it.*

A witness may *waive his privilege*, and answer at his peril. If the witness answers questions on the examination in chief, tending to criminate himself, he is bound to answer on the cross-examination, though the answer may implicate him in a transaction affecting his life. So, if the witness begins to answer he must proceed, and if he be cautioned that he is not compellable to answer a question which may tend to criminate him, and chooses to answer it, he is bound to answer all questions relative to that transaction. But Phillipps† quotes a case in which the majority of the judges thought that it made no difference to the right of the witness to protection, that he had chosen to answer in part; being of opinion that he was entitled to it at whatever stage of the inquiry he chose to claim it.

From the nature of the right it may be inferred, that he will be at liberty to answer, or refuse to answer, any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. On the other hand, it is only reasonable that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party.

* Roscoe, 173. † 2, 936.

An *accomplice*, admitted to give evidence against his associate in guilt, is bound to make a full and fair confession of the whole truth as to the offence which is the subject matter of the prosecution. If he waives the privilege, he does so fully in relation to that act; but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue.

Where a witness is entitled to *decline answering* a question, and does decline, the rule is said to be, that this not answering can have no effect with the jury. So where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address remarked upon the refusal, the judge interposed and said, that no inference was to be drawn from such a refusal.

2. **Where Answering may Degrade Witness's Character.** The point has frequently been raised and argued, whether a witness on cross-examination, is bound to give an answer to questions put that are not relevant to the matters in issue, but the answering of which will have a direct tendency to degrade the witness's character, though it may not subject him to a criminal prosecution. If a witness, for instance, were asked whether he had not suffered some infamous punishment, or if any other question of the same kind were asked, imputing criminality to the witness in some past transaction and not relevant to the matters in issue, would he be compellable to answer? The doubt only exists where the questions put are not relevant to the matter in issue, but are merely propounded for the purpose of throwing

light on the witness's character; for if the transactions to which the witness is interrogated form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character. There is no fixed rule on this point, but the weight of authority seems to be, that questions tending to degrade the character of the witness and not relevant to the matter in issue, may be put, but that the witness is not bound to answer. If, however, the witness chooses to answer such questions, the party who asks them must be bound by his answers, and cannot be allowed to falsify them by evidence.

## MODES OF IMPEACHING THE CREDIT OF WITNESSES.

The credit of a witness may be impeached, either simply by questions put to him on a cross-examination, or by calling other witnesses to impeach his credit. No witness's character for veracity can be impeached except by *contradictory proof*, or by proof affecting his *character for veracity.*

1. **Proof of General Character for Veracity.** The party against whom a witness is called, may examine other witnesses as to his general character. To impeach the credit of a witness you can only examine to his general character, and not to particular facts—that is, not to particular facts which, if true, would impeach his character for veracity; and the reason given is, that every man may be supposed capable of supporting his general character, but it is not likely he should be prepared to answer to particular facts, without notice; and

unless his general character and behavior are in issue, he has not notice.

In impeaching the credit of a witness, the interrogations cannot embrace both his moral and military character and standing, as, for instance, "Does the accused belong to witness's company, and if so, what character does he bear in the company?" The regular mode of examining into the general character of a witness is, by inquiring of the witnesses who are called to impeach it, whether they have the means of knowing his general character for veracity, and whether, with such knowledge, they would believe him on his oath. In reply, the other party may cross-examine the witnesses who have given evidence against the general character of his witness, as to their means of knowledge and the grounds of their opinion; or may by fresh evidence support his own witness's general character for veracity, or may attack the character of the impeaching witness.

2. **Proof of Contradictory Statements.** The credit of a witness may be impeached by proof that he has made statements out of court on the same subject, contrary to what he swears at the trial, provided he has been previously cross-examined as to such alleged statements; and provided also, that such statements are material to the question in issue. This evidence of contradictory statements is produced for the purpose of exciting doubt and distrust against his testimony as to the particular transaction on which the discrepancy arises, and in some cases, to raise suspicion as to the truth of his testimony in general. These contradictory statements may be either verbal or in writing.*

* 2 Phillipps' Ev., 955–959.

**Contradicting his own Witness.** It is clear that the party calling a witness, will not be allowed to give general evidence that he is not to be believed on his oath. But a party is not to be sacrificed to his witness; he is not represented by him, nor ought to be identified with him, or bound by all he may say. On the other hand, a party ought to be placed under such restrictions as may be necessary for preventing unfair or dishonest practice. If a party, not acting himself a dishonest part, is deceived by his witness, is he to be restrained from laying the true state of the case before the court? Further, if a witness, whether from mistake, ignorance, or design, gives evidence unfavorable to the party who calls him, is the party to be restrained from calling other witnesses to prove facts different from those which he has represented? *The rule is*, that where a witness is called, and makes statements contrary to those which are expected from him, the party calling him may prove the facts in question by other witnesses; for such facts are evidence in the case, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental and consequential only. Where a witness is contradicted by the party calling him, as to certain facts, it is not necessary that the remainder of his evidence should be repudiated, because a party cannot prove his own witness to be of such a general bad character as would render him unworthy of credit.

**As to Belief.** A witness can depose to such facts only as are within his own knowledge, but even in giving evidence in chief, there is no rule which requires a witness to depose to facts with an expression of certainty

that excludes all doubt in his mind. It is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain writing being the handwriting of a particular individual, though the witness will not aver positively to these facts. A witness must not swear to impressions simply; that is descending to a test too vague. It should be persuasion or belief founded on facts within his own knowledge. The testimony of a witness *that he thought* the plaintiff told him so and so—*was very confident* he said so, but would not swear that he did—is a statement of the strength of the recollection of a fact by the witness, and is admissible evidence.*

**As to Opinion.** Although, in general, a witness cannot be asked what his opinion upon a particular question is, since he is called for the speaking as to *facts* only, yet where matter of *skill and judgment* is involved, a person competent to give an opinion may be asked what that opinion is. On a question of mental capacity the opinion of an intimate acquaintance, not a medical man, is competent when connected with facts and circumstances within his knowledge, and disclosed by him in his testimony as the foundation of his opinion. It is not, in general, competent for witnesses to state opinions or conclusions from facts, whether such facts are known to them or derived from the testimony of others. The exceptions to the rule are confined to questions of science, trade, and a few others of the same nature. Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade, and scientific persons may give their opinion on matters

* Roscoe, Crim. Ev., 179.

of science, and medical men may be asked whether, in their judgment such and such appearances are symptoms of insanity or other disease, &c.*

The *opinions of an expert* are evidence, but neither conclusive nor exclusive proof. Every person of judicial training knows that the opinions of medical or other scientific or practical experts often differ, and that they sometimes err in a body as if by some epidemic contagion. There is a judicial case involving scientific inquiry, in the printed record of which are the answers of twenty-three experts to the same question; twenty-two of them give decision one way, and a single one of them gives a reverse decision; and in the conclusion, it was proved, beyond all controversy, that he alone was right and that all the others erred. In general, the opinions of an expert are of more or less weight and value, according to the person's constitution of mind, and the degree of completeness of the collection of pertinent facts on which his mind acts.†

Every question is admissible of a *military man*, where it is founded on local knowledge or circumstances which are not within the reach of all the members of the court, as where he gives his opinion as to the exact execution of a certain plan of operations, this opinion being based on facts within his actual knowledge. But where it is merely a question of military science, to affect the officer who is undergoing his trial, it is obvious that the court is met for no other purpose but to try that; and that they have before them the facts in evidence, on which they are to ground their conclusions.

* Roscoe, Crim. Ev., 179, 180.

† Attorney-General Cushing's Opinion, May 17th, 1855.

In conclusion, it may be remarked that in weighing the conflicting testimony of witnesses, it ought not to excite surprise that witnesses of fair reputation should differ in minute points in the relation of facts. An exact accordance in the narration of minute particulars would rather create suspicion, and tend to evince previous contrivance and conspiracy. The non-agreement of witnesses, therefore, on points which are not of a prominent and striking nature, in many cases, may be no impeachment of their general credibility, and ought to be carefully distinguished from wilful and corrupt misrepresentations.*

* Simmons, 481.

# APPENDIX.

# APPENDIX.

No. 1.

**Form of Order appointing a General Court-Martial.**

The last paragraph omitted when the court can be kept up with thirteen members.

War Department,
Adjutant-General's Office, Washington, *Feb. 26th*, 186–.

Special Orders, }
No. }

A general court-martial is hereby appointed to meet at West Point, New York, on the 5th day of March, proximo, or as soon thereafter as practicable, for the trial of ——— ———, and such other prisoners as may be brought before it.

*Detail for the Court:*

1. ———
2. ———
3. ———
4. ———
5. ———
6. ———
7. ———
8. ———
9. ———
10. ———
11. ———
12. ———
13. ———

—— —— Judge Advocate.

No other officers than those named can be assembled without manifest injury to the service.

By order of the Secretary of War,

L. T., *Adjutant-General.*

No. 2.

**Form of Order appointing a Garrison or Regimental Court-Martial.**

HEAD-QUARTERS,
WEST POINT, N. Y., *March 1st*, 186–.

ORDERS, }
No. }

A garrison court-martial will convene at this post to-morrow morning, at 10 o'clock, for the trial of ——— ———, and such other prisoners as may be brought before it.

*Detail for the Court:*

1. ———
2. ———
3. ———

By order of Col. B.
E. C. B., *Adjutant.*

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No. 3.

**Form of Order appointing a Court of Inquiry.**

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE, WASHINGTON, ——, 186–.

SPECIAL ORDERS, }
No. }

By direction of the President of the United States (or, at the instance of Major ——), a court of inquiry is hereby appointed to meet at —— on ——, or as soon thereafter as practicable, to investigate the facts and circumstances connected with, &c., and also give their opinion upon the facts which may be developed.

*Detail for the Court:*

1. ——— ———
2. ——— ———
3. ——— ———

——— ——— Judge Advocate.

By order of the Secretary of War,
L. T., *Adjutant-General.*

No. 4.

**Form of Order appointing a Board for retiring Disabled Officers.**

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE, WASHINGTON, ——, 186–.

SPECIAL ORDERS, }
No. }

I. By direction of the President, a board of officers will assemble in this city at 12 M. on the 28th instant, or as soon thereafter as practicable, to examine into and determine the facts in relation to the nature and occasion of the disability of such officers disabled to perform military service as may be brought before it.

The board will be guided in its action by such sections of the act of Congress approved August 3, 1861, providing for it, as may be applicable to the subject.

*Detail for the Board:*

1. ——— ———
2. ——— ———
3. ——— ———
4. ——— ———
5. ——— ———

———, will act as recorder of the board.

By order,

L. T., *Adjutant-General.*

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No. 5.

**Mode of recording the Proceedings of a Court-Martial.**

Proceedings of a general court-martial, which convened at West Point, New York, by virtue of the following Special Order.

(*Here insert a copy of the order.*)

West Point, N. Y., *March 5th*, 186-.

10 A. M. The court met pursuant to the foregoing order.

*Present.*

1. Lieut.-Col. G. D. R., Ordnance Department.
2. Major C. C. A., 13th Regiment of Infantry.
3. Captain K. G., 5th Regiment of Cavalry.
4. Captain D. D. P., 4th Regiment of Artillery.
5. Captain J. G. P., Topog. Engineers.

&c. &c.

Captain H. E. M., 10th Regiment of Infantry, Judge Advocate.

*Absent.*

Captain A. B. C., 1st Regiment of Artillery.

Captain S. B., Assistant Adjutant-General.

The Judge Advocate read a communication from Captain C., stating the cause of his absence, &c.; the letter is appended and marked ——.

"The cause of Captain B.'s absence not known."

The court then proceeded to the trial of Lieutenant X. Y., —— Regiment of Infantry, who was called before the court, and having heard the order appointing the court read, was asked, if he had any objection to any member named in the order.

The accused objected to Captain ——, and stated his cause of challenge as follows:

(Here insert the statement.)

Captain —— remarked that, &c.

The court was cleared, the challenged member retiring, and after due deliberation the doors were opened, the accused and challenged party present, and the decision of the court was announced by the judge advocate, "That the challenge is sustained as sufficient, and that Captain —— is excused from serving as a member of the court."

The accused having no objections to any of the other members, the court was then, in his presence, duly sworn by the judge advocate, and the judge advocate was duly sworn by the president of the court.

The accused applied to the court to be permitted to introduce M. N., Esq., as his counsel, which application was granted, and he appeared as counsel for the accused.*

The accused, Lieutenant X. Y., —— Regiment of Infantry, was arraigned on the following charge and specification.

CHARGE.—*Drunkenness on duty.*

*Specification.*—In this, that he, Lieutenant X. Y., of the —— Regiment of Infantry, was drunk whilst on duty at company drill. All this at —— —— on or about the 10th day of January, 186–.

To which charge and specification the accused pleaded as follows:

To the *specification*—"Not guilty."

To the CHARGE—"Not guilty."†

Captain O. P., 5th Artillery, a witness for the prosecution, was duly sworn.

Question by judge advocate.

Answer.

Question by judge advocate.

Answer.

Question by defence.

Answer.

Question by defence.

Answer.

Question by judge advocate.

Answer.

Question by the court.

Answer, &c.

The prosecution here closed.

Lieutenant R. S., 7th Infantry, a witness for the defence, was duly sworn.

Question by defence.

Answer.

* Application for delay or postponement of trial must now be made.

† All persons present in court, who have been summoned as witnesses, are now directed to withdraw and remain in waiting until called for.

Question by judge advocate.

Answer.

Question by defence.

Answer.

Question by the court.

Answer, &c.

The accused having no further testimony to offer, requested until to-morrow to prepare his final defence. The court granted his request, and adjourned to meet again at 10 o'clock A. M., to-morrow, the 6th inst.

WEST POINT, N. Y., *March 6th*, 186–.

10 A. M. The court met pursuant to adjournment. Present, same members as yesterday, the judge advocate, and the accused and his counsel.

The proceedings of yesterday having been read by the judge advocate, the accused, Lieutenant X. Y., presented the written address (appended and marked ——), which was read by his counsel in his defence.

The judge advocate submitted the case to the court without remark.*

The court was then cleared for deliberation, and having maturely considered the evidence adduced, find the accused, Lieutenant X. Y., of the —— Regiment of Infantry, as follows:

Of the *specification*—"Guilty."

Of the CHARGE—"Guilty."

And the court do, therefore, sentence him, Lieutenant X. Y., of the —— Regiment of Infantry, *to be cashiered.*

G. D. R.,
*Lieutenant-colonel of Ordnance,*
*President.*

H. E. M.,
*Captain 10th Infantry,*
*Judge Advocate.*

* Should the judge advocate intend to reply, he here notifies the court, and may ask for requisite time for preparation.

There being no further business before them the court adjourned *sine die*.

G. D. R.,
*Lieutenant-colonel of Ordnance,*
*President.*

H. E. M.,
*Captain 10th Infantry,*
*Judge Advocate.*

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No. 6.

**Form of General Order confirming or disapproving the Proceedings of a General Court-Martial.**

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE, WASHINGTON, *March 30th*, 186–.

GENERAL ORDERS, No. }

I. At the general court-martial which convened at West Point, N. Y., pursuant to "Special Orders," No. —, of ——, 186–, from the War Department, and of which Lieutenant-Colonel G. D. R., Ordnance Department, is president, was arraigned and tried, Lieutenant X. Y., of the —— Regiment of Infantry, on the following charge and specification:

CHARGE.—*Drunkenness on duty.*

*Specification.*—In this, that he, Lieutenant X. Y., of the —— Regiment of Infantry, was drunk whilst on duty at company drill. All this —— ——, on or about the 10th day of January, 186–.

To which charge and specification the accused pleaded as follows:

To the *specification*—"Not guilty."

To the CHARGE—"Not guilty."

FINDINGS OF THE COURT.

The court, after having maturely considered the evidence adduced, find the accused, Lieutenant X. Y., —— Regiment of Infantry, as follows:

Of the *specification*—"Guilty."

Of the CHARGE—"Guilty."

SENTENCE.

And the court do, therefore, sentence him, Lieutenant X. Y., — Regiment of Infantry, "*to be cashiered.*"

II. In conformity with the 65th of the rules and articles of war, the proceedings of the foregoing court-martial have been transmitted to the Secretary of War, and by him laid before the President, by whom they have been confirmed.

III. Lieutenant X. Y., accordingly, ceases to be an officer of the army from this date.

IV. The general court-martial of which Lieutenant-Colonel G. D. R. is president, is dissolved.

By order of the Secretary of War,

L. T.,
*Adjutant-General.*

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No. 7.

**Form of Judge Advocate's Certificate.**

I certify that Major A. B. C., 5th Infantry, has, from the 5th to the 10th February, 186–, both days inclusive, been in attendance as member of a general court-martial which convened at Fort Monroe, Va., February 5th, 186–, by virtue of "Special Orders," No. —, from the War Department, Adjutant-General's Office, Washington, ——, 186–.

D. E. F.,
*Lieutenant and Judge Advocate.*

FORT MONROE, VA., *February 10th*, 186–.

No. 8.

**Forms of Charges and Specifications under different Articles of War.**

All charges are headed as follows:

CHARGES AND SPECIFICATIONS PREFERRED AGAINST —— ——:

CHARGE.— *Violation of the seventh article of war.*

*Specification.*—In this: That he, Private D——, of company G Mounted Riflemen, did begin, or cause, a mutiny in company G Mounted Riflemen, and in the execution or furtherance of which, he, the said D——, did resist the lawful authority of his superior, Sergeant W——, of company G Mounted Riflemen, and did, with a revolving pistol, then and there shoot and kill the said Sergeant W——, who, being in the execution of his office, was endeavoring to quell the disorderly conduct of the said D—— and other soldiers: This at the camp of said company at the ———, Texas, on or about the thirtieth day of June, in the year one thousand eight hundred and fifty-five.

CHARGE.— *Violation of the ninth article of war.*

*Specification.*—In this: That he, W. H., an enlisted soldier in the service of the United States, acting corporal of company D 2d Infantry United States army, did offer violence against Brevet Lieutenant-Colonel C——, captain 3d Regiment of Infantry United States army, while in the execution of his office, by discharging at him, the said Brevet Lieutenant-Colonel C——, a loaded musket, thereby causing his death. This on the road from San Diego, California, to Camp Yuma, California, on or about the 6th day of June, 185–.

CHARGE.—*Disobedience of Orders.*

*Specification.*—In this: That he, First Lieutenant A. B., 1st Regiment of Infantry, United States army, having received orders from the Commanding General of the army, in New York, on the —— February, 185–, to proceed on the —— March,

185–, to join his company, did disobey said orders; and did, without leave and in disobedience of said orders, remain absent from his company, and from duty, till on or about the — July, 185–.

CHARGE.—*Desertion.*

*Specification.*—In this: That he, J. C., an enlisted soldier in the service of the United States, private of company D, 2d Infantry, United States army, did desert the said service from —— ——, on or about the 31st day of May, 185–, and did remain absent from said service until delivered up as a prisoner at the —— ——, on or about the 16th day of June, 185–.

CHARGE.—*Misapplication and embezzlement of public money intrusted to him.*

*Specification.*—In that he, Captain D. E. F—— at —— on ——, did then and there take, convert to his use, misapply and embezzle a large sum, that is to say, twenty thousand seven hundred and one dollars and two cents ($20,701.02), public money of the United States, intrusted to him for the service of the —— department.

CHARGE.—*Breach of arrest.*

*Specification.*—In this: that Major G. H——, after being placed in arrest by General B., in Special Orders, dated September 1st, 1861, did leave his confinement before he was set at liberty by his commanding officer or by a superior officer, by going beyond the limits assigned to him by orders, dated September 1st, 1861, and signed by General B., commanding, &c. This at or near ——, on or about the 3d September, 1861.

CHARGE.—*Conduct unbecoming an officer and a gentleman.*

*Specification.*—In this: that he, A. B——, did positively deny, to one or more commissioned officers, that he had played at cards with private C., or any other enlisted man of the command, which denial was false. This at Camp ——, on or about the ——, 1862.

Under the 99th article of war, "all crimes not capital, and all disorders and neglects, *to the prejudice of good order and military discipline*," must be taken cognizance of by courts-martial. Therefore any crime, disorder, or neglect, not specified in some one of the other articles, must be charged under this general article, the 99th, thus:

"Conduct to the prejudice of good order and military discipline."

"Neglect of duty, to the prejudice of good order and military discipline."

"Insubordinate conduct, to the prejudice of good order and military discipline."

"Tyrannical conduct, to the prejudice of good order and military discipline."

"Disorders and neglects, to the prejudice of good order and military discipline," &c., &c., &c.

CHARGE.—*Insubordinate conduct, to the prejudice of good order and military discipline.*

*Specification 3d.*— In that he, the said ——, having received from the War Department, in a letter dated January 16, 185–, instructions in regard to breaches of discipline, with orders to publish said instructions to the Department of Texas, he, the said ——, did, at San Antonio, Texas, on the 8th of February, 185–, in contempt of the obedience and submission due to the said decision of the President, accompany the publication to the troops under his command, with a commentary on the instructions designed to contradict and refute them, and denouncing them as a "poison," and appealing from the order of the President, to the troops under his command.

## EXTRACTS FROM THE CONSTITUTION OF THE UNITED STATES, AND ITS AMENDMENTS.

Article I. Section 8. The Congress shall have power

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, * * * ;

17. To exercise exclusive legislation in all cases whatsoever, * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; * * *.

Section 9.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Article II. Section 2.

1. The President shall be the Commander in Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; * * *, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

Section 3.

1. Treason against the United States, shall consist only of

levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of Treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

## AMENDMENTS.

Article II. A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Art. III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Art. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * * .

Art. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence.

Art. VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLES OF WAR.

AN ACT FOR ESTABLISHING RULES AND ARTICLES FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES.*

SECTION 1. *Be it enacted, by the Senate and House of Representatives of the United States of America, in Congress assembled*, That, from and after the passing of this act, the following shall be the rules and articles by which the armies of the United States shall be governed:

ARTICLE 1. Every officer now in the army of the United States shall, in six months from the passing of this act, and every officer who shall hereafter be appointed shall, before he enters on the duties of his office, subscribe these rules and regulations.

ART. 2. It is earnestly recommended to all officers and soldiers diligently to attend divine service; and all officers who shall behave indecently or irreverently at any place of divine worship shall, if commissioned officers, be brought before a general court-martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending shall, for his first offence, forfeit one-sixth of a dollar, to be deducted out of his next pay; for the second offence, he shall not only forfeit a like sum, but be confined twenty-four hours; and for every like offence, shall suffer and pay in like manner; which money, so forfeited, shall be applied, by the captain or senior officer of the troop or company, to the use of the sick soldiers of the company or troop to which the offender belongs.

ART. 3. Any non-commissioned officer or soldier who shall use any profane oath or execration, shall incur the penalties expressed in the foregoing article; and a commissioned officer

* These rules and articles, with the exceptions indicated by the notes, annexed to articles 20, 55, 65, 87, and section 2, remain unaltered, and in force at present.

shall forfeit and pay, for each and every such offence, one dollar, to be applied as in the preceding article.

ART. 4. Every chaplain commissioned in the army or armies of the United States, who shall absent himself from the duties assigned him (excepting in cases of sickness or leave of absence), shall, on conviction thereof before a court-martial, be fined not exceeding one month's pay, besides the loss of his pay during his absence; or be discharged, as the said court-martial shall judge proper.

ART. 5. Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the Chief Magistrate or Legislature of any of the United States, in which he may be quartered, if a commissioned officer, shall be cashiered, or otherwise punished, as a court-martial shall direct; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial.

ART. 6. Any officer or soldier who shall behave himself with contempt or disrespect toward his commanding officer, shall be punished, according to the nature of his offence, by the judgment of a court-martial.

ART. 7. Any officer or soldier who shall begin, excite, cause, or join in, any mutiny or sedition, in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

ART. 8. Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, coming to the knowledge of any intended mutiny, does not, without delay, give information thereof to his commanding officer, shall be punished by the sentence of a court-martial with death, or otherwise, according to the nature of his offence.

ART. 9. Any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence

against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court-martial.

Art. 10. Every non-commissioned officer or soldier, who shall enlist himself in the service of the United States, shall, at the time of his so enlisting, or within six days afterward, have the articles for the government of the armies of the United States read to him, and shall, by the officer who enlisted him, or by the commanding officer of the troop or company into which he was enlisted, be taken before the next justice of the peace, or chief magistrate of any city or town corporate, not being an officer of the army, or where recourse cannot be had to the civil magistrate, before the judge advocate, and in his presence shall take the following oath or affirmation: "I, A. B., do solemnly swear or affirm (as the case may be), that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever; and observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles for the government of the armies of the United States." Which justice, magistrate, or judge advocate is to give to the officer a certificate, signifying that the man enlisted did take the said oath or affirmation.

Art. 11. After a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs, or commanding officer, where no field officer of the regiment is present; and no discharge shall be given to a non-commissioned officer or soldier before his term of service has expired, but by order of the President, the Secretary of War, the commanding officer of a department, or the sentence of a general court-martial; nor

shall a commissioned officer be discharged the service but by order of the President of the United States, or by sentence of a general court-martial.

ART. 12. Every colonel, or other officer commanding a regiment, troop, or company, and actually quartered with it, may give furloughs to non-commissioned officers or soldiers, in such numbers, and for so long a time, as he shall judge to be most consistent with the good of the service; and a captain, or other inferior officer, commanding a troop or company, or in any garrison, fort, or barrack of the United States (his field officer being absent), may give furloughs to non-commissioned officers or soldiers, for a time not exceeding twenty days in six months, but not to more than two persons to be absent at the same time, excepting some extraordinary occasion should require it.

ART. 13. At every muster, the commanding officer of each regiment, troop, or company, there present, shall give to the commissary of musters, or other officer who musters the said regiment, troop, or company, certificates signed by himself, signifying how long such officers, as shall not appear at the said muster, have been absent, and the reason of their absence. In like manner, the commanding officer of every troop or company shall give certificates, signifying the reasons of the absence of the non-commissioned officers and private soldiers; which reasons and time of absence shall be inserted in the muster-rolls, opposite the names of the respective absent officers and soldiers. The certificates shall, together with the muster-rolls, be remitted by the commissary of musters, or other officer mustering, to the Department of War, as speedily as the distance of the place will admit.

ART. 14. Every officer who shall be convicted before a general court-martial of having signed a false certificate relating to the absence of either officer or private soldier, or relative to his or their pay, shall be cashiered.

ART. 15. Every officer who shall knowingly make a false muster of man or horse, and every officer or commissary of

musters who shall willingly sign, direct, or allow the signing of muster-rolls, wherein such false muster is contained, shall, upon proof made thereof, by two witnesses, before a general court-martial, be cashiered, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

ART. 16. Any commissary of musters, or other officer, who shall be convicted of having taken money, or other thing, by way of gratification, on mustering any regiment, troop, or company, or on signing muster-rolls, shall be displaced from his office, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

ART. 17. Any officer who shall presume to muster a person as a soldier who is not a soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly.

ART. 18. Every officer who shall knowingly make a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop, or company, or garrison, under his command; or of the arms, ammunition, clothing, or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.

ART. 19. The commanding officer of every regiment, troop, or independent company, or garrison, of the United States, shall, in the beginning of every month, remit, through the proper channels, to the Department of War, an exact return of the regiment, troop, independent company, or garrison, under his command, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who shall be convicted of having, through neglect or design, omitted sending such returns, shall be punished, according to the nature of his crime, by the judgment of a general court-martial.

ART. 20. All officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer

death, or such other punishment as, by sentence of a court-martial, shall be inflicted.*

Art. 21. Any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop, company, or detachment, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court-martial.

Art. 22. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on the penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.

Art. 23. Any officer or soldier who shall be convicted of having advised or persuaded any other officer or soldier to desert the service of the United States, shall suffer death, or such other punishment as shall be inflicted upon him by the sentence of a court-martial.

Art. 24. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, confined, and of asking pardon of the party offended, in the presence of his commanding officer.

Art. 25. No officer or soldier shall send a challenge to another officer or soldier, to fight a duel, or accept a challenge if sent, upon pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment, at the discretion of a court-martial.

Art. 26. If any commissioned or non-commissioned officer commanding a guard shall knowingly or willingly suffer any person whatsoever to go forth to fight a duel, he shall be pun-

* Modified by act of 29th May, 1830, and see act of August 5th, 1861, sec. 2.

ished as a challenger; and all seconds, promoters, and carriers of challenges, in order to duels, shall be deemed principals, and be punished accordingly. And it shall be the duty of every officer commanding an army, regiment, company, post, or detachment, who is knowing to a challenge being given or accepted by any officer, non-commissioned officer, or soldier, under his command, or has reason to believe the same to be the case, immediately to arrest and bring to trial such offenders.

Art. 27. All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, though the persons concerned should belong to another regiment, troop, or company; and either to order officers into arrest, or non-commissioned officers or soldiers into confinement, until their proper superior officers shall be acquainted therewith; and whosoever shall refuse to obey such officer (though of an inferior rank), or shall draw his sword upon him, shall be punished at the discretion of a general court-martial.

Art. 28. Any officer or soldier who shall upbraid another for refusing a challenge, shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept of challenges, as they will only have acted in obedience to the laws, and done their duty as good soldiers who subject themselves to discipline.

Art. 29. No sutler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open for the entertainment of soldiers, after nine at night, or before the beating of the reveille, or upon Sundays, during divine service or sermon, on the penalty of being dismissed from all future sutling.

Art. 30. All officers commanding in the field, forts, barracks, or garrisons of the United States, are hereby required to see that the persons permitted to sutle shall supply the soldiers with good and wholesome provisions, or other articles, at a reasonable price, as they shall be answerable for their neglect.

Art. 31. No officer commanding in any of the garrisons,

forts, or barracks of the United States, shall exact exorbitant prices for houses or stalls, let out to sutlers, or connive at the like exactions in others; nor by his own authority, and for his private advantage, lay any duty or imposition upon, or be interested in, the sale of any victuals, liquors, or other necessaries of life brought into the garrison, fort, or barracks, for the use of the soldiers, on the penalty of being discharged from the service.

ART. 32. Every officer commanding in quarters, garrisons, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, or disturbing fairs or markets, or of committing any kind of riots, to the disquieting of the citizens of the United States, he, the said commander, who shall refuse or omit to see justice done to the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be cashiered, or otherwise punished, as a general court-martial shall direct.

ART. 33. When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company, to which the person or persons so accused shall belong, are hereby required, upon application duly made by, or in behalf of the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect, or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magis-

trates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

Art. 34. If any officer shall think himself wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application being made to him, be refused redress, he may complain to the general commanding in the state or territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into said complaint, and take proper measures for redressing the wrong complained of, and transmit, as soon as possible, to the Department of War, a true state of such complaint, with the proceedings had thereon.

Art. 35. If any inferior officer or soldier shall think himself wronged by his captain, or other officer, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if, upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial.

Art. 36. Any commissioned officer, store-keeper, or commissary, who shall be convicted at a general court-martial of having sold, without a proper order for that purpose, embezzled, misapplied, or wilfully, or through neglect, suffered any of the provisions, forage, arms, clothing, ammunition, or other military stores belonging to the United States, to be spoiled or damaged, shall, at his own expense, make good the loss or damage, and shall, moreover, forfeit all his pay, and be dismissed from the service.

Art. 37. Any non-commissioned officer or soldier who shall be convicted at a regimental court-martial of having sold, or designedly, or through neglect, wasted the ammunition delivered out to him, to be employed in the service of the United States, shall be punished at the discretion of such court.

Art. 38. Every non-commissioned officer or soldier who shall be convicted before a court-martial of having sold, lost, or spoiled, through neglect, his horse, arms, clothes, or accoutrements, shall undergo such weekly stoppages (not exceeding the half of his pay), as such court-martial shall judge sufficient, for repairing the loss or damage; and shall suffer confinement, or such other corporeal punishment as his crime shall deserve.

Art. 39. Every officer who shall be convicted before a court-martial of having embezzled or misapplied any money with which he may have been intrusted, for the payment of the men under his command, or for enlisting men into the service, or for other purposes, if a commissioned officer, shall be cashiered, and compelled to refund the money; if a non-commissioned officer, shall be reduced to the ranks, be put under stoppages until the money be made good, and suffer such corporeal punishment as such court-martial shall direct.

Art. 40. Every captain of a troop or company is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores belonging to the troop or company under his command, which he is to be accountable for to his colonel in case of their being lost, spoiled, or damaged, not by unavoidable accidents, or on actual service.

Art. 41. All non-commissioned officers and soldiers who shall be found one mile from the camp without leave, in writing, from their commanding officer, shall suffer such punishment as shall be inflicted upon them by the sentence of a court-martial.

Art. 42. No officer or soldier shall lie out of his quarters, garrison, or camp without leave from his superior officer, upon penalty of being punished according to the nature of his offence, by the sentence of a court-martial.

Art. 43. Every non-commissioned officer and soldier shall retire to his quarters or tent at the beating of the retreat; in default of which he shall be punished according to the nature of his offence.

Art. 44. No officer, non-commissioned officer, or soldier

shall fail in repairing, at the time fixed, to the place of parade, of exercise, or other rendezvous appointed by his commanding officer, if not prevented by sickness or some other evident necessity, or shall go from the said place of rendezvous without leave from his commanding officer, before he shall be regularly dismissed or relieved, on the penalty of being punished, according to the nature of his offence, by the sentence of a court-martial.

Art. 45. Any commissioned officer who shall be found drunk on his guard, party, or other duty, shall be cashiered. Any non-commissioned officer or soldier so offending shall suffer such corporeal punishment as shall be inflicted by the sentence of a court-martial.

Art. 46. Any sentinel who shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer death, or such other punishment as shall be inflicted by the sentence of a court-martial.

Art. 47. No soldier belonging to any regiment, troop, or company shall hire another to do his duty for him, or be excused from duty but in cases of sickness, disability, or leave of absence; and every such soldier found guilty of hiring his duty, as also the party so hired to do another's duty, shall be punished at the discretion of a regimental court-martial.

Art. 48. And every non-commissioned officer conniving at such hiring of duty aforesaid, shall be reduced; and every commissioned officer knowing and allowing such ill practices in the service, shall be punished by the judgment of a general court-martial.

Art. 49. Any officer belonging to the service of the United States, who, by discharging of fire-arms, drawing of swords, beating of drums, or by any other means whatsoever, shall occasion false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

Art. 50. Any officer or soldier who shall, without urgent necessity, or without the leave of his superior officer, quit his

guard, platoon, or division, shall be punished, according to the nature of his offence, by the sentence of a court-martial.

ART. 51. No officer or soldier shall do violence to any person who brings provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States, employed in any parts out of the said States, upon pain of death, or such other punishment as a court-martial shall direct.

ART. 52. Any officer or soldier who shall misbehave himself before the enemy, run away, or shamefully abandon any fort, post, or guard which he or they may be commanded to defend, or speak words inducing others to do the like, or shall cast away his arms and ammunition, or who shall quit his post or colors to plunder and pillage, every such offender, being duly convicted thereof, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

ART. 53. Any person belonging to the armies of the United States who shall make known the watchword to any person who is not entitled to receive it according to the rules and discipline of war, or shall presume to give a parole or watchword different from what he received, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

ART. 54. All officers and soldiers are to behave themselves orderly in quarters and on their march; and whoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses, or gardens, corn-fields, enclosures of meadows, or shall maliciously destroy any property whatsoever belonging to the inhabitants of the United States, unless by order of the then commander-in-chief of the armies of the said States shall (besides such penalties as they are liable to by law), be punished according to the nature and degree of the offence, by the judgment of a regimental or general court-martial.

ART. 55. Whosoever, belonging to the armies of the United States in foreign parts, shall force a safeguard, shall suffer death.*

* Modified by act of February 13th, 1862, sec. 5.

Art. 56. Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.

Art. 57. Whosoever shall be convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.

Art. 58. All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be answerable.

Art. 59. If any commander of any garrison, fortress, or post shall be compelled, by the officers and soldiers under his command, to give up to the enemy, or to abandon it, the commissioned officers, non-commissioned officers, or soldiers who shall be convicted of having so offended, shall suffer death, or such other punishment as shall be inflicted upon them by the sentence of a court-martial.

Art. 60. All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

Art. 61. Officers having brevets or commissions of a prior date to those of the regiment in which they serve, may take place in courts-martial and on detachments, when composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such officers belong, they shall do duty and take rank both in courts-martial and on detachments which shall be composed of their own corps, according to the commissions by which they are mustered in the said corps.

Art. 62. If, upon marches, guards, or in quarters, different corps of the army shall happen to join, or do duty together,

the officer highest in rank of the line of the army, marine corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President of the United States, according to the nature of the case.

ART. 63. The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume, nor are they subject to be ordered on any duty beyond the line of their immediate profession, except by the special order of the President of the United States; but they are to receive every mark of respect to which their rank in the army may entitle them respectively, and are liable to be transferred, at the discretion of the President, from one corps to another, regard being paid to rank.

ART. 64. General courts-martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

ART. 65.* Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.

ART. 66. Every officer commanding a regiment or corps may

* Modified by act of 29th May, 1830, and December 24th, 1861.

appoint, for his own regiment or corps, courts-martial, to consist of three commissioned officers, for the trial and punishment of offences not capital, and decide upon their sentences. For the same purpose, all officers commanding any of the garrisons, forts, barracks, or other places where the troops consist of different corps, may assemble courts-martial, to consist of three commissioned officers, and decide upon their sentences.

Art. 67. No garrison or regimental court-martial shall have the power to try capital cases or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison nor put to hard labor, any non-commissioned officer or soldier for a longer time than one month.

Art. 68. Whenever it may be found convenient and necessary to the public service, the officers of the marines shall be associated with the officers of the land forces, for the purpose of holding courts-martial, and trying offenders belonging to either; and, in such cases, the orders of the senior officer of either corps who may be present and duly authorized shall be received and obeyed.

Art. 69. The judge advocate, or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself; and administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of the regimental and garrison courts-martial:

"You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, according to the provisions of 'An Act establishing Rules and Articles for the government of the armies of the United States,' without

partiality, favor, or affection; and if any doubt should arise, not explained by said articles, according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear, that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

And as soon as the said oath shall have been administered to the respective members, the president of the court shall administer to the judge-advocate, or person officiating as such, an oath in the following words:

"You, A. B., do swear, that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."

ART. 70. When a prisoner, arraigned before a general court-martial, shall, from obstinacy and deliberate design, stand mute, or answer foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had regularly pleaded not guilty.

ART. 71. When a member shall be challenged by a prisoner, he must state his cause of challenge, of which the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court.

ART. 72. All the members of a court-martial are to behave with decency and calmness; and in giving their votes are to begin with the youngest in commission.

ART. 73. All persons who give evidence before a court-martial are to be examined on oath or affirmation, in the following form:

"You swear, or affirm (as the case may be), the evidence

you shall give in the cause now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Art. 74. On the trials of cases not capital, before courts-martial, the deposition of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and person accused are present at the taking the same, or are duly notified thereof.

Art. 75. No officer shall be tried but by a general court-martial, nor by officers of an inferior rank, if it can be avoided. Nor shall any proceedings of trials be carried on, excepting between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court-martial, require immediate example.

Art. 76. No person whatsoever shall use any menacing words, signs, or gestures, in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.

Art. 77. Whenever any officer shall be charged with a crime, he shall be arrested and confined in his barracks, quarters, or tent, and deprived of his sword by the commanding officer. And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior officer, shall be cashiered.

Art. 78. Non-commissioned officers and soldiers, charged with crimes, shall be confined until tried by a court-martial, or released by proper authority.

Art. 79. No officer or soldier who shall be put in arrest shall continue in confinement more than eight days, or until such time as a court-martial can be assembled.

Art. 80. No officer commanding a guard, or provost-marshal, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United

States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

ART. 81. No officer commanding a guard, or provost-marshal, shall presume to release any person committed to his charge without proper authority for so doing, nor shall he suffer any person to escape, on the penalty of being punished for it by the sentence of a court-martial.

ART. 82. Every officer or provost-marshal, to whose charge prisoners shall be committed, shall, within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, make report in writing, to the commanding officer, of their names, their crimes, and the names of the officers who committed them, on the penalty of being punished for disobedience or neglect, at the discretion of a court-martial.

ART. 83. Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service.

ART. 84. In cases where a court-martial may think it proper to sentence a commissioned officer to be suspended from command, they shall have power also to suspend his pay and emoluments for the same time, according to the nature and heinousness of the offence.

ART. 85. In all cases where a commissioned officer is cashiered for cowardice or fraud, it shall be added in the sentence, that the crime, name, and place of abode, and punishment of the delinquent, be published in the newspapers in and about the camp, and of the particular state from which the offender came, or where he usually resides; after which it shall be deemed scandalous for an officer to associate with him.

ART. 86. The commanding officer of any post or detachment, in which there shall not be a number of officers adequate to form a general court-martial, shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall order a court to be assembled at the nearest post or department, and the party accused, with neces-

sary witnesses, to be transported to the place where the said court shall be assembled.

ART. 87.* No person shall be sentenced to suffer death but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned; *nor shall more than fifty lashes be inflicted on any offender, at the discretion of a court-martial;* and no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence.

ART. 88. No person shall be liable to be tried and punished by a general court-martial for any offence which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period.

ART. 89. Every officer authorized to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer; which, in the cases where he has authority (by article 65), to carry them into execution, he may suspend, until the pleasure of the President of the United States can be known; which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison where any regimental or garrison court-martial shall be held, may pardon or mitigate any punishment ordered by such court to be inflicted.

ART. 90. Every judge advocate, or person officiating as such, at any general court-martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-

* So much of these rules and articles as authorizes the infliction of corporeal punishment by stripes or lashes, was specially repealed by act of 16th May, 1812. By act of 2d March, 1833, the repealing act was repealed, so far as it applied to the crime of desertion, which, of course, revived the punishment by lashes for that offence. Repealed by act of August 5th, 1861, sec. 3.

martial to the secretary of war; which said original proceedings and sentence shall be carefully kept and preserved in the office of said secretary, to the end that the persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

The party tried by any general court-martial shall, upon demand thereof, made by himself, or by any person or persons in his behalf, be entitled to a copy of the sentence and proceedings of such court-martial.

ART. 91. In cases where the general, or commanding officer may order a court of inquiry to examine into the nature of any transaction, accusation, or imputation against any officer or soldier, the said court shall consist of one or more officers, not exceeding three, and a judge advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the faithful performance of their duty. This court shall have the same power to summon witnesses as a court-martial, and to examine them on oath. But they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in the question.

ART. 92. The proceedings of a court of inquiry must be authenticated by the signature of the recorder and the president, and delivered to the commanding officer, and the said proceedings may be admitted as evidence by a court-martial, in cases not capital, or extending to the dismission of an officer, provided that the circumstances are such that oral testimony cannot be obtained. But as courts of inquiry may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit, in the hands of weak and envious commandants, they are hereby prohibited, unless directed by the President of the United States, or demanded by the accused.

ART. 93. The judge advocate or recorder shall administer to the members the following oath:

"You shall well and truly examine and inquire, according to your evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God."

After which the president shall administer to the judge advocate or recorder the following oath:

"You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court, and the evidence to be given in the case in hearing. So help you God."

The witnesses shall take the same oath as witnesses sworn before a court-martial.

ART. 94. When any commissioned officer shall die or be killed in the service of the United States, the major of the regiment, or the officer doing the major's duty in his absence, or in any post or garrison, the second officer in command, or the assistant military agent, shall immediately secure all his effects or equipage, then in camp or quarters, and shall make an inventory thereof, and forthwith transmit the same to the office of the Department of War, to the end that his executors or administrators may receive the same.

ART. 95. When any non-commissioned officer or soldier shall die, or be killed in the service of the United States, the then commanding officer of the troop or company shall, in the presence of two other commissioned officers, take an account of what effects he died possessed of, above his arms and accoutrements, and transmit the same to the office of the Department of War, which said effects are to be accounted for, and paid to the representatives of such deceased non-commissioned officer or soldier. And in case any of the officers, so authorized to take care of the effects of deceased officers and soldiers, should, before they have accounted to their representatives for the same, have occasion to leave the regiment or post, by preferment or otherwise, they shall, before they be permitted to quit the same, deposit in the hands of the commanding officer, or of the assistant military agent, all the effects of such deceased

non-commissioned officers and soldiers, in order that the same may be secured for, and paid to, their respective representatives.

ART. 96. All officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay or hire in the service of the artillery, or corps of engineers of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the other troops in the service of the United States.

ART. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers in the regular forces; save only that such courts-martial shall be composed entirely of militia officers.

ART. 98. All officers serving by commission from the authority of any particular state, shall, on all detachments, courts-martial, or other duty, wherein they may be employed in conjunction with the regular forces of the United States, take rank next after all officers of the like grade in said regular forces, notwithstanding the commissions of such militia or state officers may be elder than the commissions of the officers of the regular forces of the United States.

ART. 99. All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

ART. 100. The President of the United States shall have power to prescribe the uniform of the army.

ART. 101. The foregoing articles are to be read and published, once in every six months, to every garrison, regiment, troop,

or company, mustered, or to be mustered, in the service of the United States, and are to be duly observed and obeyed by all officers and soldiers who are, or shall be, in said service.

SEC. 2. *And be it further enacted*, That in time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.*

SEC. 3. *And be it further enacted*, That the rules and regulations by which the armies of the United States have heretofore been governed, and the resolves of Congress thereunto annexed, and respecting the same, shall henceforth be void and of no effect, except so far as may relate to any transactions under them prior to the promulgation of this act, at the several posts and garrisons respectively, occupied by any part of the army of the United States. [APPROVED, April 10, 1806.]

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## EXTRACTS FROM ACTS OF CONGRESS.

1. "If any non-commissioned officer, musician, or private shall desert the service of the United States, he shall, in addition to the penalties mentioned in the rules and articles of war, be liable to serve for and during such a period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall and may be tried by a court-martial, and punished, although the term of his enlistment may have elapsed previous to his being apprehended or tried."—*Act 16th March*, 1802, *sec.* 18.

2. "No officer or soldier in the army of the United States shall be subject to the punishment of death for desertion in time of peace."—*Act 29th May*, 1830.

3. "Whenever a general officer commanding an army, or a

* Modified by act of February 13th, 1862, section 4th.

colonel commanding a separate department, shall be the accuser or prosecutor of any officer in the army of the United States under his command, the general court-martial for the trial of such officer shall be appointed by the President of the United States."

"The proceedings and sentence of the said court shall be sent directly to the secretary of war, to be by him laid before the President for his confirmation or approval, or orders in the case."

"So much of the sixty-fifth article of the first section of 'An act for establishing rules and articles for the government of the armies of the United States,' passed on the tenth of April, eighteen hundred and six, as is repugnant hereto, shall be, and the same is hereby repealed."—*Act 29th May*, 1830, *sec.* 1, 2, *and* 3.

4. "That all officers and other persons, charged by this act, or any other act, with the safe-keeping, transfer, and disbursement of the public moneys, other than those connected with the post-office department, are hereby required to keep an accurate entry of each sum received, and of each payment or transfer; and that if any one of the said officers, or of those connected with the post-office department, shall convert to his own use, in any way whatever, or shall use, by way of investment in any kind of property or merchandise, or shall loan, with or without interest, or shall deposit in any bank, or shall exchange for other funds, except as allowed by this act, any portion of the public moneys intrusted to him for safe-keeping, disbursement, transfer, or for any other purpose, every such act shall be deemed and adjudged to be an embezzlement of so much of the said moneys as shall be thus taken, converted, invested, used, loaned, deposited, or exchanged, which is hereby declared to be a felony; and any failure to pay over or to produce the public moneys intrusted to such person, shall be held and taken to be *prima facie* evidence of such embezzlement; and if any officer charged with the disbursements of public moneys shall accept, or receive, or transmit to the treasury department to be allowed in

his favor, any receipt or voucher from a creditor of the United States, without having paid to said creditor, in such funds as the said officer may have received for disbursement, or such other funds as he may be authorized by this act to take in exchange, the full amount specified in such receipt or voucher, every such act shall be deemed to be a conversion by such officer to his own use of the amount specified in such receipt or voucher; and any officer or agent of the United States, and all persons advising or participating in such act, being convicted thereof, before any court of the United States of competent jurisdiction, shall be sentenced to imprisonment for a term of not less than six months, nor more than ten years, and to a fine equal to the amount of the money embezzled. And, upon the trial of any indictment against any person for embezzling public money under the provisions of this act, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the treasury, as required in civil cases, under the provision of the act, entitled, 'An Act to provide more effectually for the Settlement of Accounts between the United States and Receivers of Public Money,' approved March third, one thousand seven hundred and ninety-seven; and the provisions of this act shall be so construed as to apply to all persons charged with the safe-keeping, transfer, or disbursement, of the public money, whether such persons be indicted as receivers or depositaries of the same; and the refusal of such person, whether in or out of office, to pay any draft, order, or warrant, which may be drawn upon him by the proper officer of the treasury department, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received or may be held, or to transfer or disburse any such money promptly, upon the legal requirement of any authorized officer of the United States, shall be deemed and taken, upon the trial of any indictment against such person for embezzlement, as *prima facie* evidence of such embezzlement."—*Act, August 6th*, 1846, *sec* 16.

5. "That every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States in any of the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial; and such officer shall be liable to be cashiered by a sentence of court-martial, and be incapacitated from holding a commission in the militia, for a term not exceeding twelve months, at the discretion of the court; and such non-commissioned officer and private shall be liable to imprisonment by a like sentence, on failure of payment of the fines adjudged against them for one calendar month, for every twenty-five dollars of such fine."

"That courts-martial for the trial of militia shall be composed of militia officers only."

"That all fines to be assessed as aforesaid shall be certified by the presiding officer of the court-martial, and shall be collected and paid over according to the provisions and in the manner prescribed by the seventh and eighth sections of the act of February twenty-eight, seventeen hundred and ninety-five, to which this is an amendment."—*Act, July 29th*, 1861, *sec.* 4, 5, *and* 6.

6. "That any commissioned officer of the army, or of the marine corps, who shall have served as such for forty consecutive years, may, upon his application to the President of the United States, be placed upon the list of retired officers, with the pay and emoluments allowed by this act."

"That, if any commissioned officer of the army, or of the marine corps, shall have become, or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list and withdrawn from active service and command, and from the line of promotion, with the following pay and emoluments, * * * ; and the next officer in rank shall be promoted to the place of the retired officer, according to the established rules of the service. * * * That there shall not be on the retired list at any one time more

than seven per centum of the whole number of officers of the army as fixed by law."

"That, in order to carry out the provisions of this act, the secretary of war, or secretary of the navy, as the case may be, under the direction and approval of the President of the United States, shall, from time to time, as occasion may require, assemble a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be of the medical staff; the board, except those taken from the medical staff, to be composed, as far as may be, of his seniors in rank, to determine the facts as to the nature and occasion of the disability of such officers as appear disabled to perform such military service, such board being hereby invested with the powers of a court of inquiry and court-martial, and their decision shall be subject to like revision as that of such courts by the President of the United States. The board, whenever it finds an officer incapacitated for active service, will report whether, in its judgment, the said incapacity result from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service. If so, and the President approve such judgment, the disabled officer shall thereupon be placed upon the list of retired officers, according to the provisions of this act. If otherwise, and if the President concur in opinion with the board, the officer shall be retired as above, either with his pay proper alone or with his service rations alone, at the discretion of the President, or he shall be wholly retired from the service, with one year's pay and allowances; and in this last case his name shall be thenceforward omitted from the army register, or navy register, as the case may be: *Provided always*, That the members of the board shall in every case be sworn to an honest and impartial discharge of their duties, and that no officer of the army shall be retired either partially or wholly from the service without having had a fair and full hearing before the board, if, upon due summons, he shall demand it."

"That the officers partially retired shall be entitled to wear the

uniform of their respective grades, shall continue to be borne upon the army register or navy register, as the case may be, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles." —*Act, August 3d*, 1861, *sec.* 15, 16, 17, *and* 18.

7. "That any commissioned officer of the army, navy, or marine corps, who, having tendered his resignation, shall, prior to due notice of the acceptance of the same by the proper authority, and, without leave, quit his post or proper duties with the intent to remain permanently absent therefrom, shall be registered as a deserter, and punished as such."

"That flogging as a punishment in the army is hereby abolished."—*Act, August 5th*, 1861, *sec.* 2 *and* 3.

8. "That, in time of war the commander of a division or separate brigade may appoint general courts-martial, and confirm, execute, pardon, and mitigate their sentences, as allowed and restrained in the sixty-fifth and eighty-ninth articles of war to commanders of armies and departments: *Provided*, That sentences of such courts, extending to loss of life, or dismission of a commissioned officer, shall require the confirmation of the general commanding the army in the field to which the division or brigade belongs: *And provided further*, That when the division or brigade commander shall be the accuser or prosecutor, the court shall be appointed by the next higher commander."—*Act, December 24th*, 1861.

9. "That the fifth section of the act of twelfth June, eighteen hundred and fifty-eight, giving sutlers a lien upon the soldiers' pay, be, and the same is hereby, repealed: and all regulations giving sutlers rights and privileges beyond the Rules and Articles of War be, and the same are hereby, abrogated."—*Act, December 24th*, 1861, *sec.* 3.

10. "That the second section of the act of the tenth of April, eighteen hundred and six, shall be, and the same is hereby, so amended as to read as follows:

"SEC. 2. *And be it further enacted*, That, in time of war or rebellion against the supreme authority of the United States,

all persons who shall be found lurking as spies, or acting as such, in or about the fortifications, encampments, posts, quarters, or head-quarters of the armies of the United States, or any of them, within any part of the United States which has been or may be declared to be in a state of insurrection, by proclamation of the President of the United States, shall suffer death by sentence of a general court-martial."

"That the fifty-fifth article of the first section of act of tenth April, eighteen hundred and six, chapter twenty, be, and the same is hereby, so amended as to read as follows:

"*Article fifty-five.* Whoever, belonging to the armies of the United States in foreign parts, or at any place within the United States, or their Territories, during rebellion against the supreme authority of the United States, shall force a safeguard, shall suffer death."—*Act, February 13th*, 1862, *sec.* 4 *and* 5.

11. "All officers or persons in the military or naval service of the United States are prohibited from employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor, who may have escaped from any persons to whom such service or labor is claimed to be due, and any officer who shall be found guilty by a court-martial of violating this article shall be dismissed from the service."—*Act, March 13th*, 1862.

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